TRANSCRIPT OF RECORD.

SUPREM. COURT OF THE UNITED STATES.

No. 86.

GEORGE SPARROW AND DAVID L. TURNER, CLAIMANTS OF THE SCHOONER WANATA, HER TACKLE, &C., APPELLANTS,

vs.

JOHN W. AVERY, W. A. AVERY, W. H. M. JOHNSON, EXECUTORS OF JOSIAH JOHNSON, DECEASED, JOHN CARROLL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 17, 1875.

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VS.,

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1 To the honorable Samuel Blatchford, district judge for the southern district of New York:

The libel and complaint of Josiah Johnson, John Carroll, William Qualy, Isaac Campbell, James R. Elcock, William Carroll, D Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, James Schultz, William Smith, and George Ellery, of the city of New York, against the schooner Wanata, her tackle, apparel, and furniture, respectfully shows:

First. That this is an action founded upon tort, civil and maritime, and said schooner is now in this district.

Second. That the libellant, Josiah Johnson, was, at the several times hereinafter stated, the owner of the pilot-boat Josiah Johnson, and the other libellants were the owners of certain clothing and other property on board of the said pilot-boat at the several times hereinafter stated.

Third. That the said pilot-boat at the said several times was tight, staunch, and strong, well and sufficiently tackled, appareled, and furnished for the business and employment in which she was engaged, to wit, as a pilot-boat.

Fourth. That on the 6th day of March, 1869, the said pilot-boat having carried away the leech-rope of the foresail and hauled into
2 near the beach, in a safe and proper place, and anchored to repair damages, and at sundown set her proper light, and continued at anchor in that place until about nine o'clock, when the said schooner ran into and against the said pilot-boat, smashed in her side, and sinking her in a few minutes, so that she became, with the property on board, a total loss.

Fifth. That the said collision happened by the fault and want of care and judgment, skill, and management of those on board the said schooner Wanata, in not keeping a proper lookout, in not in time taking steps to avoid the collision, and in sailing at too great a rate of speed, and the same was without the fault of those on the pilot-boat.

Sixth. That the loss and damage to the libellants by said collision was the sum of twenty-three thousand dollars.

Seventh. That all and singular the premises are true, and within the jurisdiction of this court.

Wherefore the libellants pray for process in due form against said vessel, the schooner Wanata, and that she may be attached and sold to pay the libellants' claim and costs, or for such relief to the libellants as may be just.

JOSIAH JOHNSON.

Sworn to before me this 8th day of March, 1869.

JOHN A. OSBORN,
U. S. Commissioner.

BEEBE, DONOHUE & COOKE,
For Libellants.

The name of Josiah Johnson stricken from the within libel wherever the same appears therein, and the names of John W. Avery, William
3 A. Avery, and William H. M. Johnson, executors of said Josiah Johnson, deceased, inserted in lieu thereof therein, by order of court of February 29th, 1872, on consent on file of proctors for libellants and claimants.

GEORGE F. BETTS,
Clerk.

Dated New York, February 29th, 1872.

Stipulation for libellants' costs, entered into pursuant to the rules and practice of this court.—Filed the 8th day of March, 1869.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the 8th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, by Josiah Johnson et al. against the schooner Wanata, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said schooner be condemned, &c., and the said libellants and C. Donohue, surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety execution may issue against their goods, chattels, and lands for the sum of two hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be
4 awarded against them by this court, or in case of appeal, by the appellate court.

JOSIAH JOHNSON.
C. DONOHUE,

Taken and acknowledged this 8th day of March, 1869, before me.
JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

C. Donohue, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

C. DONOHUE.

Sworn to this 8th day of March, 1869, before me.
JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America [L. S.] to the marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York, on the 8th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, by Josiah Johnson against the schooner Wanata, her tackle, &c., (collision $23,000,) for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said schooner or vessel, her tackle, &c., may be cited in general and special to answer
5 the premises, and all proceedings being had that the said schooner or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellants.

You are therefore hereby commanded to attach the said schooner or vessel, her tackle, &c., and to detain the same in your custody, until the further

order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 30th day of March instant, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the honorable Samuel Blatchford, judge of the said court, at the city of New York, in the southern district of New York, this 8th day of March, in the year of our Lord one thousand eight hundeed and sixty-nine, and of our Independence the ninety-third.

GEORGE F. BETTS, *Clerk.*

BEEBE, DONOHUE & COOK,
Proctors for Libellant.

In obedience to the within monition, I attached the schooner Wanata, &c., therein described, on the 8th day of March, 1869, and have not given due notice to all persons claiming the same, that this court will, on
6 the 30th day of March inst., (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

R. MURRAY,
U. S. Marshal.

Dated March 30, 1869.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Thursday, the 11th day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

Present, the Hon. Samuel Blatchford, district judge.

THE SCHOONER WANATA, HER TACKLE, &C., }
asm. }
JOSIAH JOHNSON AND OTHERS. }

And now George Sparrow, of the city of New York, owner of seven-eighths of said schooner Wanata, intervening for the interest of himself, and of David L. Turner, owner of the other one-eighth in the said schooner, appears before the honorable court and makes claim to the said vessel, &c., as the same are attached by the marshal, under
7 process of this court, at the instance of Josiah Johnson and others; and the said George Sparrow doth aver that he was in possession of the said vessel at the time of the attachment thereof, and that the persons above named are the true and bona fide owner' of the said vessel, and that no other person is the owner thereof; wherefore he prays to defend accordingly.

GEORGE SPARROW.

Sworn to and subscribed this 11th day of March, A. D. 1869, before me.

JOHN A. OSBORN,
U. S. Commissioner.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Claimants.

Stipulation entered into pursuant to the rules and practice of this court. Filed the 11th day of March, 1869.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the 8th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, by Josiah Johnson and al. against the schooner Wanata, her tackle, &c., for reasons and causes in the said libel mentioned, and praying that process may issue against said vessel, and the parties hereto, hereby consenting, and that in case of default or contumacy on the part of the claimants or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands.

8 And whereas, also, a claim has been filed in said cause by George Sparrow and o'rs:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or, upon an appeal, by the appellate court.

GEORGE SPARROW.
JAMES R. SPARROW.

Taken and acknowledged this 11th day of March, 1869, before me.

JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George Sparrow and James R. Sparrow, parties to the above stipulation, being duly sworn, each doth depose and say that he resides in the city of Brooklyn, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

GEORGE SPARROW.
JAMES R. SPARROW.

Sworn to this 11th day of March, 1869, before me.

JOHN A. OSBORN,
U. S. Commissioner.

Recorded 11th day of March, 1869.

Clerk.

9 *Stipulation for value entered into pursuant to the rules and practice of this court.—Filed the 11th day of March, 1869.*

District court of the United States for the southern district of New York.

In admiralty.

Whereas a libel was filed on the 8th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, by Josiah Johnson against the schooner Wanata, her tackle, &c., for the reasons and causes in the said libel mentioned; and whereas the said schooner, &c., is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel; and whereas it has been consented that said

vessel be discharged from custody on the claimants executing stipulations for costs and value, the latter in the sum of sixteen thousand dollars, ($16,000,) as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimants or their sureties execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order of decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Evarts, Southmayd & Choate, esquires, proctors for the claimants of said schooner, abide by and pay the money awarded by the final decree rendered by the court or the appellate court,
10 if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

GEORGE SPARROW.
JAMES R. SPARROW.
JAMES R. SPARROW, J'R.

Taken and acknowledged this 11th day of March, 1869, before me.

JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James R. Sparrow, James R. Sparrow, j'r, and George Sparrow, parties to the above stipulation, being duly sworn, each deposes and says that he resides in the eastern district of New York; that they, George Sparrow and James R. Sparrow, sen'r, is worth the sum of thirty thousand dollars, and he, James R. Sparrow, j'r, is worth the sum of twenty thousand dollars over and above all his just debts and liabilities.

Sworn to this 11th day of March, 1869, before me.

JOHN A. OSBORN,
U. S. Commissioner.

Recorded this 11th day of March, 1869.

11 To the honorable Samuel Blatchford, district judge of the United States for the southern district of New York.

The claim and answer of George Sparrow and David L. Turner, of the city of New York, owners of the schooner Wanata, intervening for their interest in the said schooner, her tackle, apparel, and furniture, to the libel of Josiah Johnson, John Carroll, William Qualy, Isaac Campbell, James R. Elcock, William Carroll, D' Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, James Schultz, William Smith, and George Ellery, allege as follows:

First. That they are entirely ignorant of the matters alleged in the second and third articles of the said libel.

Second. That they admit that on the 6th March, 1869, at about nine o'clock of the evening of that day, the said schooner Wanata ran into the pilot-boat Josiah Johnson, in the said libel mentioned, and that, as the result of such collision, the said pilot-boat was sunk, and became, with what property was on board of her, a total loss but these respondents deny that such collision happened by the fault or want of care or judgment, skill or management, of the persons on board of the said schooner

Wanata, either in the particulars stated in the said libel or otherwise howsoever, or that the same was without the fault of those on board of the said pilot-boat; on the contrary, these respondents say that the said collision happened as hereinafter mentioned.

Third. That the said schooner Wanata, which is a schooner of the burthen of two hundred and twenty-nine tons, set sail from the port of New York, at about half past three o'clock of the afternoon of
12 the 6th March, 1869, bound on a voyage to Charleston, in the State of South Carolina, and that at the time she so set sail she was well and sufficiently manned and provided for the said voyage, having, besides her master and mate, a crew of six men on board of her. That she passed Sandy Hook about six o'clock post meridian, and it soon coming on to blow a violent gale from the northwest, her sails were double-reefed. That at about half past six o'clock, two lights, one a red and one a green light, in globe lanterns, were set in her rigging, but in consequence of the force and violence of the winds they were blown out; that they were immediately relighted, but were blown out again; that pieces of canvas were then tied around the top part of the said lanterns so as to lessen the draft of air through them, but the lights in them were still blown out, and being again relighted were blown out again, and it was found impossible to keep them burning. That the wind about this time had increased in violence and was accompanied by frequent snow-squalls, and the temperature was very cold so cold that the water breaking over the said vessel was frozen, and large quantities of ice were formed upon her decks and sides, and that, besides, the night was very dark. That the master of the said vessel, deeming it imprudent and unsafe to continue his voyage, the course of which lay in the track of vessels sailing up and down the coast, on such a night, and when he could keep no lights burning upon his vessel to give warning of her presence to any approaching craft, determined to sail for Barnegat, and to anchor there under the lee of the land until morning, and that it was whilst carrying such determination into effect that the said schooner came in collision with the said pilot-boat. That from the time the said schooner passed Sandy Hook until not more than five minutes before said collision took place the master was at her wheel steering her, and the mate was in the forepart of said schooner on the lookout, and that about five minutes before the said collision took place the mate went aft to relieve the captain
13 (who had suffered much from and whose hands had been injured by the cold) at the wheel, and the captain stationed himself upon the house of the said schooner on the lookout. That a few minutes after this change was made, and at about nine o'clock at night, the reflection of a light (as if from a light suddenly produced near the surface of the water) was observed simultaneously by the said captain and mate upon objects in the bows of the said schooner, and instantly the captain gave the order to put her helm hard up, and simultaneously with the giving of such order it was obeyed, but it was then too late to avoid the said collision, which immediately followed. That the captain ran forward to ascertain what had happened, and found under the bows of said schooner a small vessel, with a lantern standing upon her deck, but with no other light displayed about her, and with no person upon her decks, but that immediately the persons on board of said small vessel came rushing from her hold in great fright and confusion and climbed over the bows of the said schooner, when the said captain learned from them that such small vessel was the pilot-boat Josiah Johnson, and

that she was lying at anchor at the time of such collision, with all of her crew below.

That from the time the said schooner passed Sandy Hook until the said collision took place her master and mate, as well as all of her crew, were on deck, taking care of and navigating her, and exercising every precaution for her safety which prudence suggested, and that for some time before the said collision three of the persons composing her crew were in her bows getting ready the anchor-chains, and that neither they nor the captain, or mate, nor any other person on board of the said schooner, saw any light on board of said pilot-boat, nor by any other means were made aware of her proximity until the instant before said collision, when said reflection was seen, and when it was impossible to avoid said collision.

14 Fourth. They deny that the said pilot-boat was, at the time of the said collision, anchored in a safe and proper place. On the contrary, they say that she was anchored in an unusual and unsafe and an improper place; that she lay in the track of vessels sailing up and down the coast, and was exposed to the very disaster which happened to her; that they are ignorant whether at sundown a proper or other light was set upon the said pilot-boat, but they say that if any such light was set it was not kept upon her; that the only light upon the said pilot-boat, at and just before the time of the said collision, was a lantern standing upon her deck, which, obscured by her bulwarks or other surrounding objects, could not be seen from a distance, and answered no purpose of warning the persons navigating the said schooner of the proximity of the said pilot-boat, and that, besides, no watch was kept upon the deck of the said pilot-boat, and no other vigilance exercised by those on board of her to guard against accidents, but that all of her crew were below, undressed, and asleep. And these respondents say that the said collision occurred through the fault of the persons on board of the said pilot-boat, (1) in anchoring her in an unusual, unsafe, and improper place; (2) in not keeping a suitable and proper light in her rigging or at her mast-head, so that it might be seen from a distance; and (3) in not keeping a watch upon her deck to guard and provide against the contingencies which are incidental to the navigation of the sea, especially at night-time and in stormy weather. And they deny that a proper lookout was not kept on board of said schooner, or that any step which could be taken to avoid the said collision was not taken as soon as the proximity of said pilot-boat became known on board of said schooner, or that the said schooner was sailing at too great a rate of speed; and they say that the speed of the said schooner was only such as the violence of the winds forced her to under double reefs in her sails,
15 which was the prudent and proper condition for her to be in under the circumstances in which she was placed.

Fifth. They deny that the loss or damage to the libellants by the said collision was the sum of twenty-three thousand dollars, or any such sum; on the contrary, they say that, as they are informed and believe, it did not exceed eight thousand dollars.

Sixth. That by the said collision the said schooner was so damaged and injured that it was considered prudent and necessary by her master to take her back to the port of New York for the purpose of being repaired; that she proceeded to New York accordingly for that purpose, and was repaired there, and that the expenses of such repairs, together with the other expenses, and the loss and damage to which she was subjected in consequence of such collision, amounted to the sum of five hundred dollars.

And these respondents pray that the said schooner Wanata, her tackle, apparel, and furniture, may be restored to them, and that the said libel may be dismissed, and that they may be awarded their reasonable costs and charges in this behalf sustained.

GEORGE SPARROW.

Sworn to before me this 19th day of May, 1869.

F. A. WILCOX,
Notary Public, N. Y. County.

[Notarial seal.]

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Claimants.

16 *Libellants' testimony.*

United States district court, southern district of New York.

JOSIAH JOHNSON ET AL.
vs.
SCHOONER WANATA, HER TACKLE, APPAREL, and Furniture. } May 31, 1870.

Before Blatchford, J.

Charles Donohue, for libellants.
Joseph H. Choate, for claimants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

DANIEL GILLESPIE, of said district, being duly sworn, says:

I reside 18 Canton street; am twenty-seven years old; followed the sea five years this month. I was on the Josiah Johnson at the time of collision. I was on deck up to ten minutes past six o'clock; light not set until I went below. I came up afterwards. I saw it was set; it was set in the main-peak halyards; it was a bright light; it was a globe (brass) lantern; it was, I should judge, ten-inch lantern. When I came up I saw it burning; it was about twenty-five minutes past six; then few minutes on deck; saw it again about twenty minutes past seven. I turned in; about twenty-five minutes to nine I turned in. I was waked up by the collision. I was below at the time; our light went out and it was fetched into the forecastle. When it was brought to me in the forecastle it was out; it was twenty minutes past seven, as near as I
17 can judge, by the clock in the schooner's cabin when the collision occurred. When I came on deck after the collision, I saw our light in the main-peak halyards; it was burning bright; such a light as that was then could be seen seven miles. The forecastle-hatch is almost eight to nine feet forward of the mainmast, that is, from the back of the quarter-deck; the mast is two feet forward of that. I got on the schooner from her port bow; our light gave me light to get on her, that is, the light on the peak-halyards. As I stood on the pilot-boat's deck the schooner's bowsprit was all of twelve feet along overhead.

Being cross-examined, he says:

The night of the collision was a stormy night, blowing a gale of wind. There had been snow-squalls in the forepart of the night, but then there was none; it was cloudy and overcast to the northward but not to the southward, not thick. The lamp on the pilot-boat was out about twenty minutes past seven; I could not say what was the matter with it; the

wind might have blown it out. I relit it again and took a piece of canvas and put it round the bottom of it, and made the canvas fast by tying it round the bottom of the lamp; I did this to stop it from blowing away; there was too much air into it; this piece of canvas covered the entire bottom of the lamp, all but a little; I allowed a little for some air. I was asleep at the time of the collision and undressed. I rushed, undressed, immediately on deck, and got upon the schooner as soon as I could. I was a good deal scared, but understood what I was doing all the time; my feeling was that my life was in danger and I was mainly intent upon saving it. It was perishing cold—the coldest night that I have felt this year—and generally a very rough night. The piece of canvas which I put over the lamp was about nine by eight inches, and I tied it with spun-yarn on the lamp, the whole width of the canvas, leaving a little space for air. The wind was northwest, and blowing a gale. The
18 pilot-boat headed to the wind. The schooner struck the pilot-boat about fifteen inches or two feet forward of the main rigging.

Redirect:

Saw all kinds of vessels that night going to southward and northward with colored lights. We had thirteen, all told, on board—six pilots, and the rest boat's crew.

DANIEL GILLESPIE.

Sworn to before me this 19th day of March, 1869.

A. W. HALL,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JOSIAH J. RUSSELL, of Brooklyn, State of New York:

Nineteen years of age; followed the sea four years. I was one of the crew of the Josiah Johnson at the time of the collision. We had anchored, as far as I could judge; had our sails furled and light up at ten minutes past . The wind was northwest. The vessel, when anchored, tailed off southeast, headed us northwest. Alexander Cochran, one of the hands, put the light up. I handed it to him. I got it from the steward, George Gerry, the last witness. I got it from him in the forecastle. The forecastle is about eight feet foward of the mainmast. When the steward gave it to me I handed it to Alexander Cochran. I did not see what he did with it. I saw it after I had given it to him; ten minutes after; it was then in the main-peak halyards, about sixteen feet from the deck; it was burning brightly. I saw it until twenty minutes past seven. I then took it down. I trimmed it. I saw it then until half past; it continued to burn brightly. I turned in at half past 8 o'clock, and it was then burning brightly. I turned in in the forecastle. My attention to the collision was by the crash. I came on deck by this hatch.
19 After I came on deck I saw our light; it was burning brightly; it was still in the main-peak halyards. I went aboard the schooner. I went right down in the cabin of the schooner and stood there. I did not notice our light again. The light was a globe light, about ten inches, I should judge.

Being cross-examined, he says:

I took the lamp down to trim it, because it was burning kind of dim. I put it back on the peak-halyards. I put it there by getting upon the companion-way, and then by getting upon the gaff; the gaff was about eight feet from the deck. I should judge that the lamp was about six feet

from the end of the gaff, toward the mainmast. The night was a very cold night. My hands were not cold, for I had mit's on. My feet were; the mit's were without fingers. When I came out of the forcastle I made a rush for the schooner and got on board of her as quick as I could. I was a good deal scared, and thought of nothing but saving my life; got on the schooner upon her starboard-bow. Her jib and fore stay-sail were set, and her cutwater was into the pilot-boat; her bowsprit and jib-boom extended entirely over the pilot-boat. It was not blowing quite so hard then as it was when we came to anchor; got onto the schooner by her bowsprit; guess in the starboard bow. I can't judge how high the schooner's bulwarks were above the pilot-boat's deck, but they were higher than I could reach. The pilot-boat came to anchor on account of losing her foresail off-shore; bursting it; she came in to repair it. She burst her foresail about three o'clock that afternoon. I could not say how many men were below in the forecastle at the time of the collision; I was asleep.

Cross:

The mit's I had covered my fingers, but had no finger divisions; as I stood on the deck of the pilot-boat the schooner's bowsprit was as far as I could reach along overhead; our lantern in the main-peak
20 halyards gave me light to get on the schooner; I noticed a number of vessels sailing with colored side-lights, sailing and steamers, that night before turning in.

JOSIAH J. RUSSELL.

Sworn this 19th day of March, 1869, before me.

A. W. HALL,
Notary Public, N. Y. Co.

U. S. district court.

JOSIAH JOHNSON
ag'st
THE SCHOONER WANATA.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

GEORGE GERRY, of said district, being duly sworn, says:

He resides 39 Cherry street, New York; am thirty-one years of age; been going to sea seventeen years; was in the pilot-boat Josiah Johnson, at time of collision, as steward; lighted her lantern that night; it was a globe lantern, about ten inches diameter; it was hung up by Russell, one of the crew, hung it up on the main-peak halyards, about fifteen feet from the deck; was below then. I went on deck about half past eight o'clock; the light then was in the main-peak halyards; then went below, stayed down. The first thing I knew of the collision was the blow. I jumped and looked out of the hatch, saw the schooner. When I came on deck our light was in the same place—showed me the way on board the schooner—still in main-peak halyards. When I
21 went below and came on deck was about the same, that was, bright. Our vessel was lying at anchor—had been so since six o'clock; went to anchor to repair sails. That light of ours could have been seen six or seven miles that night.

Being cross-examined, the witness stated:

A pretty fresh breeze was blowing from the northwest—there had been snows-qualls during the afternoon; in the afternoon there had

been only pretty stiff breezes, and it did not blow so hard at night; I cannot say whether at the time of the collision all of the persons on board of the pilot-boat were below or not; I was below; all of the persons who were below, forward, were lying down asleep; I cannot say how the pilot-boat headed at the time of the collision; the collision took place about quarter past nine o'clock; we went to anchor about half past six o'clock; I lit the lamp, and the boat-keeper told me to give it to one of the boys, and I passed it to Russell; I handed it to him below, and saw him go on deck with it; the sail was furled when I saw the lamp in the peak halyards; the lamp being in the halyards, fifteen or twenty feet from the outer end of the gaff, and above fifteen feet from the deck, and about half the length of the gaff from the mainmast; the lamp was a globe lantern, about ten inches in diameter; oil was burned in it; don't know whether it was lard or whale; it was called Baker's oil; the sail of the pilot-boat was split during the afternoon; the fore-sail was; this was about six o'clock; I don't know how the damage to the sail was done, except that it was done by the force of the wind; when I came out of the forecastle, after the collision, I made a straight line for the schooner; I jumped up as I was, partly dressed, rushed on deck and got on the starboard bow of the schooner as quick as I could; the schooner's bows extended over the pilot-boat when I got on deck of the latter; I cannot say how high the schooner's bulwarks were above the deck of the pilot-boat; they were higher
22 than I could reach, and I had to climb up by means of the bowsprit rigging of the schooner; the schooner struck the pilot-boat on the starboard side, as near midships as I could judge; I could not tell whether the schooner's jib was up, because I was in such a hurry to get on board that I did not take notice.

Redirect:

There is a hatch down towards the forecastle; that hatch is about eight to ten feet forward of the mainmast; my business is steward department, and not sails.

GEORGE GERRY.

Subscribed and sworn to before me this 19th day of March, 1869.

A. W. HALL,
Notary Public, N. Yo. Co.

U. S. district court.

JOSIAH JOHNSON
vs.
THE SCHOONER WANATA.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JOHN CARROLL, being duly sworn, says:

He is a Sandy Hook pilot; been so 3 years; I was on the Josiah Johnson at collision; went below last at half past six o'clock; had been below most of the day; before I had gone below then, a light had been set on the main-peak halyards; I noticed the light again when I came on deck, on the main-peak halyards; after I came on deck, as I
23 passed over the main boom I saw the light attached to the peak halyard, it was burning beautiful; our lantern gave me light to get on the schooner; it showed me the bowsprit and head-gear of schooner; I got on schooner from port bow.

Being cross-examined, he says:

I had been below most of the afternoon, and came on deck about half past six, as near as I can judge; it was after the boat came to anchor; I then went below, and did not come up again until after the collision. I was not asleep at the time of the collision, but I was partly undressed, having pants and slippers on; that's all. When I heard the crash of the collision I rushed on deck. The rest of the pilots and crew did the same thing. It was about time for them to be getting on deck too. I went with only the clothes I had on—no hat, nor coat, nor boots. As soon as I got on deck I rushed for the schooner, and everybody on board did the same thing, as near as I can judge. At first going off I was alarmed; but when I saw the position I knew what was the matter. I considered my life in great danger, and my principal concern was to save it and see how I could get aboard of the schooner the best way. The night was a cold, clear night, blowing fresh—pretty fresh. We came to anchor for the purpose of repairing our sails, which had been burst whilst off shore; they were all iced up, too, in getting up under the land. I judge that we anchored about half a mile from shore, and in about four fathoms water. Barnegat light bore from us about south or south half west, distant some 18 or 19 miles, or thereabouts. When I passed from the companion-way to go on board the schooner, I passed along the starboard side of the pilot-boat. The schooner struck the pilot-boat amidships, just about the break of the quarter-deck, a little forward of the mainmast, and about 20 to 21 feet, as near as I can
24 judge, abaft of the foremast. The pilot-boat went down in eight or ten minutes after the collision, as near as I can judge; it might have been a little more.

Redirect:

The sail we split was the foresail.

JOHN CARROLL.

Sworn to before me this 2d day of April, 1869.

A. W. HALL,
Notary Public, N. Y. Co.

U. S. district court.

JOSIAH JOHNSON
vs.
THE SCHOONER WANATA, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM M. QUALEY, sworn, says:

He is a Sandy Hook pilot; been so one year. I was on the pilot-boat Josiah Johnson at time of collision. I went below after we came to an anchor. Time, shortly after sundown. Before I went below a light had been put up in the main-peak halyards. I came on deck about one and a half hours after that; the light was then burning bright in the main-peak halyards. Stayed on deck ten minutes; then went
25 below. I did not come up again until after the collision. I was awake at the time of the collision; when I went on deck the light was still burning; it stood on deck; where the peak halyards having slacked it stood. The peak halyards had slacked, I suppose, by the carrying away of the peak halyards. I passed the light as I went along the deck; it was burning very bright and clear

when I passed it, on my way to the schooner. I noticed it after I got in the schooner; it was burning.

Being cross-examined, the witness says:

The pilot-boat came to anchor because we had bursted our foresail, and went in to repair our sails. The injury to our sails happened about 4 o'clock. It was blowing very hard, with heavy snow-sq'alls, at the time we went to the anchorage. We went in under a double-reefed mainsail, with one bonnet in the jib, the foresail being furled. It continued to blow very hard throughout the night up to the time of the collision, and the snow-squalls continued up to about seven o'clock, and it was very cold—about as cold a night as I had experienced during the winter. I was in the cabin at the time of the collision. I had sea-clothing on only, that is, shirts, pantaloons, and pair of slippers, and a white hat on. I was startled by the collision, but I did not go on deck for about two minutes. I was, I think, the last on deck. I did not know what was coming when I got on deck. I made the best of my way to get on the schooner, and I got on board of her as quick as I possibly could, moving rapidly to do so. I considered at the time that my life was in great peril. I did not know at first which was safest, the schooner or the pilot-boat; but I was principally concerned at the time about saving my life. I went over the schooner's port bow; at the time I had nothing on but what I had on in the cabin; but I had a coat and
pair of boots in my hand, which I seized as I ran out of the cabin
26 in a hurry. The pilot-boat was anchored about a quarter to half
of a mile from shore, in about four fathoms of water. Barnegat light bore about south of us, distant from 12 to 15 miles. The night was altogether a pretty wild night, not thick, clear at the time of the collision; the stars were all out.

Redirect:

I did not see Barnegat light; but I heard the remark, they could see the flare of it once in a while.

W. H. QUALEY.

Sworn to before me this 2d day of April, 1869.

A. W. HALL,
Notary Public, N. Y. Co.

U. S. district court.

JOSIAH JOHNSON, &c.,
vs.
THE SCHOONER WANATA, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ALEXANDER M. COCHRAN, of said district, says:

Been to sea six to seven years, off and on. I was on the pilot-boat at time of collision. I went below last before the collision when my watch out at six o'clock. Did not come on deck again. I was asleep at the time of the collision in the forecastle. The hatch of the forecastle is
about 8 to 9 feet forward of the mainmast. The light had been
27 set before I went below in the main-peak halyards. It was a
bright light. It was a globe lantern. When I came on deck again it was in the main-peak halyards. I got on the schooner over the starboard bow, as the schooner's bowsprit and jib. Schooner was 10 or 12 feet higher than our forecastle hatch over it. I saw the light after

I came on deck; it was burning bright; such a light could be seen six or seven miles.

Being cross-examined, the witness says:

I was asleep at the time of the collision, with nothing but my pants and shirt on; I was awakened by the crash, and got on board of the schooner as soon as I possibly could; I was not frightened, and took my time; as near as I could judge, all of the rest of the crew were rushing for the schooner at the same time; I did not stop to dress nor to get my clothes. I do not know whether the light that I have spoken of when I came on deck after the collision, that it was when I went below; I got on the schooner over her bows by means of the back ropes, the stays running from the bowsprit to the schooner. It was blowing a gale of wind at the time, and it was very cold also; it was not a thick night; I do not know whether it was cloudy or not; it was necessary to have a light to see things by; I do not know whether I got on the schooner with Schultz or not; all hands went together; nothing was between me and the light when I got on the schooner; as I came out of the pilot-boat hatch the light was right in front of me. The steps go out the after part of the hatch. As I got out of the hatch I saw the light ahead of me, as I got over the schooner's bow. I could not tell whether it was above or below the level of my head as I got out of the hatch.

A. M. COCHRAN.

Sworn this 1st day of April, 1869, before me.

A. W. HALL,
Notary Public, N. Y. Co.

28 U. S. district court.

JOSIAH JOHNSON
vs.
THE SCHOONER WANATA, HER TACKLE, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM CARROLL, of said district, pilot:

Sandy Hook pilot—two years, nearly; I was on the Josiah Johnson at time of collision; came to anchor about six o'clock; there was a light put up at six o'clock; I saw it put up; but I was not on deck afterwards; it was put up in the main-peak halyards; I came on deck after the collision next; the light was then standing on deck, on its bottom, attached to the main-peak halyards; I believe it had been lowered by the mainmast being unstepped or broke; it slacked the halyards; I lowered the light to the deck; it was burning when I came on deck, and when I got on the schooner it continued to burn until she went down; I watched until she went down.

Being cross-examined, the witness says:

I guess the pilot-boat was anchored about three-fourths of a mile off, and bore in about 4½ fathoms of water in depth. The night was clear and cold, very cold; cold enough to make me very fast; it was blowing a moderate gale, nothing very extra—we could have carried double-reefed sails, I suppose, if we had been under way; at the time of the collision I was sitting at the table 'longside of the water-pitcher, about

half-dressed, in my sea-clothes, having on pantaloons and shirt only; after the crash of the collision, I rushed on deck with all the rest, and got on the schooner as soon as I could, climbing up upon her port
29 bow; I got on the schooner with nothing on besides the clothes I had on below, except my cap, which I picked up as I left the cabin; the light that I speak of was sitting on our deck, as I got out of the companion-way; it was on the quarter-deck, about six or eight feet abaft of the mainmast, on the starboard side of the pilot-boat, as near as I can judge; the schooner struck the pilot-boat amidships, nearer the mainmast than the foremast.

Q. How do you know that the lantern was attached to the main peak halyards, whilst standing on deck, as you have said?

A. I saw some loose rope about it, and some slack rope from the main gaff, and I inferred from that that it was attached to the main-peak halyards. When I passed out of the companion-way I went forward on the starboard side, and passed immediately, with a quick movement, right on board of the schooner.

Redirect:

The lantern on our deck gave me light to get on the schooner; I knew the lantern, and knew it was ours.

WILLIAM CARROLL.

Sworn this 2d day of April, 1869, before me.

A. W. HALL,
Notary Public N. Y. Co.

U. S. district court.

JOSIAH JOHNSON
vs.
THE SCHOONER WANATA, &c., &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

HERO A. SCHULTZ, of Hanover:

30 I am 27 years of age; been to sea since 16 years old; I was on the pilot-boat, at time of collision, as boy; had been on her since 10th Nov., 1868; I went below about 20 minutes past eight o'clock; at that time we had a good light up—a bright light it was; a globe lantern, main-peak halyard, it was about 15 to 16 feet up above deck; I did not come on deck again after that until the collision; when I came on deck again after the collision, saw the light abaft the mainmast burning good; I think it was lower when I came on deck than it had been before; the mainmast was broken; I think, then, I went on the starboard bow of the schooner; I saw the bow of the schooner sticking into us by our light; that when I got hold of a thing I went up by that; I went right aft when I went on the schooner; I did not get my clothes; I started to go back to the pilot-boat, but did not get on her, she was sinking; she sunk within ten minutes after collision; the collision woke me. There were no lights on the schooner, that I saw. Before I went below that night I had seen vessels sail up and down the coast with colored lights.

Being cross-examined, the witness says:

The night was clear, but overcast; there was no fog; it was blowing a gale of wind, and it was middling cold. At the time of the collision I was asleep in the forecastle, undressed, and was awakened by the crash.

I went to the hatch and looked up and saw the schooner's bowsprit and jib-boom across our deck, and then went on deck, and thought the schooner would be the safest side to go on, and then I immediately got upon the schooner, on the starboard side, by means of some of her head-gear; I was not very much frightened.

Q. You say that when you went on deck the light was lower than when you went below; was it not also nearer the mast?

A. I cannot tell.

Q. Why cannot you tell?

31 A. At a time like that I could not tell whether it was nearer the mast; one don't think of that; but I observed that it was lower. The light I speak of was on the port side of the schooner, about twelve feet from the schooner; the light was considerably lower when I went on deck after the collision than when I went below; I should think that it was ten or twelve feet lower; it was that much lower that I had to look down upon it when I stood upon the pilot-boat's deck.

H. A. SCHULTZ.

Sworn to before me this 18th day of April, 1869.

A. W. HALL,
Notary Public, N. Y. Co.

U. S. district court.

JOSIAH JOHNSON
vs.
THE SCHOONER WANATA, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM SMITH, being duly sworn, says:

That he was on board the pilot-boat Josiah Johnson at the time of collision; I am 21 years old; born in Holland; followed the sea seven years; I went below last at half past eight, on the night of the collision; at that time our vessel had a light up on the peak halyards, a bright (white) light in a globe lantern, about fifteen feet above the deck; when I came on deck again it was burning bright; this was after the collision; I found my way on the schooner by the light on the pilot-boat; that light, in its condition after I came on deck after the collision,

32 could be seen eight miles; our boat sunk in about seven minutes after the collision; when I went below and came up again, both times, our vessel was at anchor.

Being cross-examined, the witness says:

I was in bed, undressed, at the time of the collision, in the forecastle; I was awakened by the crash, and rushed up on deck and jumped on board of the schooner as soon as I could; I did not stop to dress; I was very frightened; I got upon the schooner upon the starboard side by means of the bowsprit shrouds; at this time the cut-water was right into us, and her bowsprit extended over the pilot-boat; the schooner had her sails up; the light that I speak of was on the starboard side of the schooner, not on the port side; I first saw the light in the peak halyards of the pilot-boat after leaving my bed, when I was getting up on the schooner's head-gear; it was blowing hard at the time; there was a good deal of confusion on board the pilot-boat at the time; every body was trying to save his life; the night was clear, the stars were out a little; it was only a little cold; the only clothes I had on were an

undershirt, a shirt, and a pair of pantaloons; there was no other light on the pilot-boat than that I have spoken of.

Redirect:

The schooner did not carry any lights that I saw; I saw the light on the pilot-boat after I got on the schooner; I was helping to haul jibs down.

Recross:

When hauling them down I stood abaft the schooner's forecastle-head, starboard side of her.

WILLIAM SMITH.

Sworn to before me this 1st day of April, 1869.

A. W. HALL,
Notary Public, New York County.

33 U. S. district court.

JOSIAH JOHNSON, &c.,
vs.
THE SCHOONER WANATA, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

LEWIS A. THOMAS, being duly sworn, says:

That he is 42 years of age, a Sandy Hook pilot by profession, been so for the last twenty years nearly; was on the Josiah Johnson at the time of the collision; I had been on deck for certainly inside of ten minutes of the collision before it; at the time I was last on deck before the collision the light was up burning brighter than usual; it was in the usual pilot-boat lantern in the main-peak halyards where they are usually hung; after anchoring, had been on deck up and down two or three times; it was burning at the other times; after anchoring first, it did not burn good, we had it taken down and trimmed, because it was a squally night, and we wanted to show a good light, and it burned well until she sunk; it went down with her burning; when I went below the last time before the collision I went in the cabin; the last time I went below, after the collision, I lay down on the locker, I could see the light burning through the skylight; I was asleep at the collision; when I got on deck I saw the light; I went on the schooner before I went again in the cabin; I went back to the pilot-boat, got into the cabin, got my clothes, and went back to the schooner; during all this time the light had not gone out; no light on the schooner that I could see, no light on her binnacle; I heard them say on the schooner that they had taken our light for Barnegat light, and the captain had called the owner on deck to show him it.

34 Being cross-examined, the witness says:

I had been asleep at the time of the collision about five or ten minutes; I had my boots off and my sea-clothes on—that is, my pantaloons, vest, shirt, and stockings; I had gone below to go to sleep; it was blowing pretty heavy at the time; the light was pretty well out at one time, but that was the first part of the evening; I know the light was taken down for the purpose of fixing it, as it was quite or nearly out; it might have been blown out; in fixing it a piece of canvas was put over the top of the lamp to prevent it from blowing out; I don't know whether the canvas was put on the top or bottom; it was a pretty

cold night, freezing, with a N. W. wind; the pilot-boat went down in about fifteen minutes after the collision; I was awakened by the crash of the collision; I immediately rushed on deck the same as the rest, without boots, or cap, or coat, and got on the schooner as soon as I could; I did not consider myself in great peril, nor was I frightened.

Q. Why then did you rush for the schooner so speedily?

A. Well, wakening out of sleep I did not know what was the matter, nor where I was; I was bewildered at the time; I got upon the schooner upon the starboard bow; I passed from the port side of the pilot-boat and got upon the starboard side of the schooner; I hurried quickly, but I did not run; I went in a pretty fast walk; the light that I have spoken of was lower when I came on deck after the collision than it was when I saw it before; it appeared to be close down near the deck on the starboard side of the pilot-boat, but no nearer the mainmast that it was before; it had not slipped down the halyards.

Q. How did you know?

A. Because I do; the mainmast had a cant aft, and that had brought the lantern down near the deck; the night was clear over head, but it was not a thick nor a clear night; it was thick along the horizon,
35 with snow-squalls to the westward; the schooner struck the pilot-boat on the starboard side about midships, right on the wake of her mainmast.

Redirect: The mainmast-head it appeared to me unstepped below, and was canted aft in this way:

As near as I could judge from looks of it, the other is the foremast.

LEWIS A. THOMAS.

United States of America.

SOUTHERN DISTRICT OF NEW YORK.

City and County of New York, ss:

Be it remembered that on this sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and
36 cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry Norton, to testify, and the truth to say, on the part and behalf of the libellants in a certain suit or matter of controversy, now depending and undetermined, in the district court of the United States for the southern district of New York, at New York, wherein—

JOSIAH JOHNSON ET AL., LIBELLANTS,
vs.
THE SCHOONER WANATA, HER TACKLE, &C., respondents.

And the said HENRY NORTON, being about the age of thirty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry Norton, and he did thereupon depose, testify, and say as follows, viz:

I have been twenty years to sea. I know the schooner Wanata. I was on board of her as second mate on the 6th of March; she had a captain named Hawkins, and mate named Weeks, and I was second mate, and four men before the mast; had a steward, who also was cook; and a M'r Sparrow, the owner of the schooner, I believe. The vessel started for Charleston, South Carolina, on that day; came in collision with a pilot-boat on that voyage, on the evening of the 6th ins't;
37 pilot-boat's name, I believe, was Josiah Johnson. Gillespie, now present, came on board our schooner from the pilot-boat after the collision; the collision sunk the pilot-boat. I had not seen the pilot-boat, or had my attention been called to her before the collision. At the time of the collision I was engaged in overhauling a range of chain; all four of the men before the mast were engaged with me. Before going to overhaul the range of chain the four men and myself had been engaged in reefing; in reefing and overhauling the chain we had been engaged over one hour and half, as near as I can judge; we were about twenty minutes between reefing and overhauling the chains, clearing up the decks; after getting through reefing, mate went aft to the wheel; he had been assisting in reefing; while we were reefing the captain was at the wheel; did not see the cook while we were reefing. I saw the cook ten or fifteen minutes before the collision, lighting the lamps. I had heard a conversation about Barnegat light prior to the collision, say ten minutes prior. I was aft by the wheel, and I saw a light under the lee bow, that is our port bow. I asked the mate what light it was; he said Barnegat; after or at the collision I looked and saw a light on the pilot-boat the moment she struck us; the light was somewhere abaft the mainmast, up in the rigging; can't say where; it was a bright light; could see a vessel that night without a light ¼ of a mile. I heard no person speak of the pilot-boat up to the time of collision.

Cross-examined by Mr. Choate:

For the last ten days I have been partly on the Wanata and partly ashore. The reason I am not on her now is I left her. I left her, I think, last Tuesday afternoon, March 9th. I shipped for the voyage. Since the 9th I have been working ashore, part of the time; been working with M'r Fetterson, stevedore. I forget when Capt. Britton first came after me, (Captain Britton of the pilot-boat;) I believe last
38 Saturday. He asked me if I would go as a witness. I said yes, if he would subpœna me. I did not want to go against the parties without, because they were my employers, and treated me well. He never had any conversation with me about the collision before I came here—not a word—nor had I any with him nor M'r Donohue. I mentioned I saw the light on the pilot-boat to Captain Hawkins first—just after the collision. I have mentioned it to Gillespie. I could not tell how high up in the rigging the light was, because I could not judge from our vessel to their vessel, because I was a distance from her. I

was eight or ten yards off. Half a minute or a minute after we struck her I saw the light. Did not keep time by the watch. I think it was fifteen minutes before that I was at the wheel, talking to the mate. I stood there about ten minutes. I was clearing the deck, waiting for a light to overhaul the chains. The collision was about a quarter past nine. Had lit them several times since dark. I attended to the reefing during that time. I was forward attending to the reefing. Four men and the mate were with me forward at the time, all the time I was reefing. About half past seven I began reefing. Got through a minute or two before nine; cannot tell to the minute. Began cleaning decks when had finished reefing. Got through in two or three minutes. I did not see M'r Sparrow from dark until after the collision. Did not look for him. Saw the captain. Pilot-boat was a schooner. Light I saw was abaft the mainmast. I ought to be at work now, at pier 5, East River. Not going to sea again. Laurence Shae, with M'r Federson, stevedore. I live at 147 Front street.

HENRY NORTON.

Subscribed and sworn to before me this 16th day of March, 1869.

JOHN. A. OSBORN,
U. S. Commissioner.

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named; that he is bound on a voyage to sea, to go more than one hundred miles from the place of trial of the above cause.

I further certify that due notification of the time and place of taking the said deposition, signed by me, was made out and served on the adverse party, or his proctor, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit.

I further certify that on the 16th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, I was attended by the proctors for the respective parties and by the witness, who was of sound mind and lawful age; and witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth; and the deposition was by me reduced to writing, in the presence of the witness and from his statement, and, after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my pos-
40 session for the purpose of filing the same with my own hand in the court for which the same was taken.

And I do further testify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States the ninety-third.

[SEAL.] JOHN A. OSBORN,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

CHARLES F. MILLER sworn:

Work ashore now. Was on the pilot-boat at the collision. Recollect her coming to anchor. She came to anchor because her foresail was bursted. Her anchor was let go, her sails were furled, and a light was put up. At moment of collision I was below; had just gone down for my oil-coat. When I started to go below I had been standing on port side of quarter-deck. I went down the fore-hatch by a ladder; had got down. Walked about thirteen or fourteen feet in the forecastle before the collision. Was going to my coat; had not got to it. When I went below the light was in the main-peak halyards, burning bright. I had been on deck for an hour and ten minutes before going below. I came on deck at eight o'clock. From eight o'clock to time I went below the light had been burning bright. Schooner struck us about mid-
41 ships; end on, head on. I got on board the schooner on her starboard bow. Saw my way with our light.

Cross-examined:

Don't know as I was on deck before eight o'clock after we anchored. the light was set before I went down; did not see it set; saw it passed up the hatch. Before eight o'clock I was lying on a locker below. Our light blew out once; I saw it come down below out, and I saw it going up the hatch lit; I saw the boat-keeper putting canvas around it. From eight o'clock till I went down I was walking around on deck keeping a look-out. I think one rushed by me out of forecastle and got out first; there were six besides me in forecastle; all but the cook rushed for the ladder. When I got on deck I looked aft and saw the light in main-peak halyards about in same place I saw it first, about fifteen or sixteen feet from deck. It took me about three seconds to get up from forcastle. After I got on schooner's deck I saw the light again; it was lower than it was when I saw it on pilot-boat; it did not look as though it was on deck of pilot-boat. I took it to be abaft the mainmast; it was abaft the mainmast when first put up, and every time I saw it; about fifteen feet abaft mainmast; it was no further aft when I last saw it than when I first saw it that night. It looked lower down when I went on the schooner. I am not related to libellant, Johnson.

JOSIAH JOHNSON sworn:

I am pilot; was not on the pilot-boat at collision; familiar with anchoring along coast; anchor there in four fathoms of water; have anchored there all along coast. Eighteen miles from New York to Sandy Hook; Sandy Hook to Cedars, four miles; Sandy Hook to Long Branch, twelve miles. I call Long Branch—Tavern Houses; Long Branch to Barnegat, twenty-eight miles.

42 Cross-examined:

Was not owner of this pilot-boat. Vessels go along coast half a mile to one mile from beach; generally give beach more of a berth in the

night. Shore from Long Branch down is straight, about south by west. Have anchored there often with pilot-boat half a mile from shore; been there one hundred times or more, possibly.

Defence.

United States district court.—Southern district of New York.

SCHOONER WANATA, &c., *ads.* JOSIAH JOHNSON ET AL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

THOMAS E. HAWKINS, a witness on behalf of the claimants, being duly sworn and examined, says:

He was captain of schooner Wanata at time of collision; has followed sea since 1856; has been commander of a vessel for three years; was commander of Wanata when she left New York, on her voyage on 6th March last. Left New York near three o'clock p. m., and was bound to Charleston; passed the Hook about five o'clock. After passing the Hook the weather looked bad, and it was squally; wind northwest, blowing heavy. After passing Hook, first double-reefed mainsail, then took in flying jib; double-reefed the foresail. At dark attempted to set our lights three times; finally got one in the box lighted; put canvas around
43 the top to keep wind from blowing it out; the force of the wind put them out. About half-past five second mate took the wheel, while they were at supper; we were about twenty minutes at supper, and after that I took the wheel; kept it until a few minutes before the collision. From supper time to the time of the collision I, with mate and the whole crew, were on deck. From eight o'clock the wind increased and blew heavier, accompanied with snow squalls; it was very cold. While I was at the wheel I told the mate, when he went forward to reef the foresail, to keep a lookout.

Q. Who relieved you at the wheel?

A. The mate.

Q. When?

A. I should think five minutes before the collision.

Q. Where had he been from the time you directed him to go forward to reef the foresail until he took the wheel?

A. He had been forward all the time.

Q. After you found, finally, that your lights would not remain burning, what did you determine to do?

A. Determined to go under Barnegat and anchor.

Q. What did you do?

A. I gave the order to overhaul the chain and clear away the anchors.

Q. What course did you pursue?

A. I was steering down about SSW. I don't know as we altered our course much. We came in collision with the pilot-boat a few minutes after nine; the mate was at the wheel.

Q. Where were you, and what were you doing at the time of collision?

A. I was on the house looking out, and the mate was at the wheel.

Q. What did you see?

A. Just as I got on top of the house I saw a light about ahead.

Q. Did you see a light, or the reflection of a light?

A. I cannot tell.

44. Q. Was it a light near or above the surface of the water apparently?

A. I couldn't tell that. I was on top of the house, and it couldn't have been very high up. When I saw the light I told the mate to put the helm hard up.

Q. What did the mate do?

A. I suppose he shifted the wheel.

Q. How long a time was it from the time you first saw the light and until you came in collision with the pilot-boat?

A. Five or ten seconds.

Q. What did you then do?

A. I went forward. First I saw a light on the pilot-boat, over our starboard bow; it was on the deck of the pilot-boat; it could not be suspended; there was nothing there to suspend it from. While we were reefing the foresail we made Barnegat light.

Q. Did you see any light from what afterwards proved to be the pilot-boat, before the time you mentioned, just before the collision?

A. No, sir.

Q. If there had been a light suspended from the rigging of the pilot-boat, and not obscured by any object, could you not have seen it?

A. Yes, sir.

Q. Would you not have seen it, in all probability?

(Objected to.)

A. Yes, sir.

Q. For how long before the collision were any, and which, of the crew engaged in the forward part of the schooner, getting ready the anchor?

A. All were engaged there for half an hour or more.

Q. Where did the schooner strike the pilot-boat?

A. About amidships, I should think; our boom went forward of her mainmast, and aft of her mainport rigging.

Q. What happened after the collision?

45 A. The crew of the pilot-boat all came aboard our vessel, were taken care of by us, and brought back to the city.

Q. How long after the collision to the time the pilot-boat sunk?

A. Probably five minutes. It was a very cold night; my fingers were frost-bitten; a good deal of ice made on the schooner's deck and sides. I had been at the wheel when the mate relieved me some all three hour. I have been sailing up and down the coast the last three years nearly. I never saw a vessel anchored in the place where the pilot-boat was before.

Q. Did you ever hear of a vessel being anchored there before?

A. I don't know as I ever did, between Barnegat and the Tavern Houses.

Q. Was there anything that you could have done to avoid the collision, and, if so, what was it, after you became aware of the presence of the pilot-boat?

A. No, sir; I don't think there was.

Q. What crew had the Wanata?

A. Eight men, including myself; it was her full complement of men. She had a jib and staysail at the time of the collision.

Q. About how high were the bulwarks of the schooner, in her bows, above the deck of the pilot-boat?

A. About ten feet, I should think.

Q. Did the jib project over the deck of the vessel?

A. Yes, sir; while I was at the wheel I could see ahead of my vessel; yes, sir.

Q. Did you or not keep a constant lookout?

A. I was looking out both sides of the vessel while I was at the wheel.

Q. And you saw no light except Barnegat light until just before the collision?

A. No, sir.

Q. What was your reason for desiring to go and anchor off Barnegat?

46 A. I thought if we got to the Gat there might be some vessels coming up. It was very cold; it was freezing some, the wind being very sharp, and we were afraid of a collision if we kept on without lights.

Cross:

The distance from Sandy Hook to lower end of Tavern Houses is seven miles, and thirty-three miles from the end of the Tavern Houses to Barnegat Light. When I got forward, after the collision, the mainmast of the pilot-boat had been unstepped or broken. When I left New York wind was blowing quite strong from NW.; it continued, as I thought, more to the west, after eight o'clock NW. by W. The distance from New York to Sandy Hook is eighteen miles. I forget whether we had got our supper before leaving the Hook—must have got, as we passed Sandy Hook at five and we took supper at half past five. This collision occurred March 6th, sundown, a little before six o'clock. We first attempted to set our lights just after supper, a little after six o'clock. The difficulty with one light was we could not keep it lighted in the box. We lighted that three times to try; we lighted it in the cabin; the steward, I think, did that; his name is Miles Weeks. First time both blowed out as soon as he got out of companion-way; second time got part of the way forward with them, both blew out; then, a third time, he got one into the box; I think the other blew out before he got that one in the box. He got the port light in the box. That lasted alight in the box. I don't know whether that was burning at collision. I had not seen it after he took it to the box until collision. I think these attempts to put up lights were before reefing sails. The mainsail was reefed first by all hands under the superintendence of the mate, the second mate also being at it. We reefed that sail, I should say, half to an hour after supper, and they, all hands, I think, continued at that steady until they finished it. That was done around me where I was, part of the men working at it around me, and it was done by my direc-

47 tion. I think then the flying-jib taken in and furled. I could not say whether all hands at it, but judge they were; second mate, I think, forward with them. That operation took about fifteen minutes, to my best recollection. I could not tell whether there was any interval between the two jobs, but I think they went from one to the other. Our true course there is S. by W., but I think was going then about half a point to windward of it; that would be S. by W. ½ W. I think right after getting through with the flying-jib I gave the orders to go at the foresail; there might have been an interval; can't say how much. All hands, including the second mate, went at that. They were at that some time over an hour, reefing that foresail; a pretty hard job. I luffed up while they were working a little to assist in—that was the only time I assisted them by luffing. The mate came aft part of the way to get the order to overhaul the chain—I think he came aft; then I gave him the order to have the chain overhauled, as I have stated. He went forward, as I supposed, to set the men at it; then he came

directly aft again, I think, but I can't say now how many times he went forward. The men had been working at that chain but a few minutes after he came to relieve me, but how long they had been working before he came aft I can't say. Then we made the exchange at the wheel, and I went down in the cabin first—I can't tell what for, whether for a chew of tobacco or what, and when I came on deck I went on the house; the house is the cabin. There is a passage around the cabin; it is a bunk cabin. Had a passenger on board besides the crew.

Redirect:

Q. How long did you stay in the cabin when you went?

A. Not over five minutes.

Q. How long had the mate been at the wheel when the collision took place?

48 A. Not over five minutes; I had just got on the house when I saw the light.

THO'S E. HAWKINS.

Examination taken, reduced to writing, and subscribed and sworn to by the witness this 31st day of May, 1869, before me.

GEO. FRANCIS DEMAREST,
Notary Public, N. Y. Co.

U. S. district court.

THE SCHOONER WANATA, &c., *ads.* JOSIAH JOHNSON AND OTHERS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

EDMUND WEEKS, being duly sworn as a witness on behalf of the complainant, says:

I am a seaman, and have followed the sea for about thirty years. I was the first mate of the Wanata, on her voyage from this port to Charleston, when she came in collision with the pilot-boat Josiah Johnson. I have been in the habit of sailing up and down the coast. The Wanata left New York about half past three o'clock p. m. of the sixth March. She passed Sandy Hook about half past four or five o'clock or somewheres thereabouts; I can't say exactly. When we got outside the Hook it was blowing a gale of wind from the NW. or W.NW. The weather looked bad. Captain Hawkins was at the wheel from the time we got outside of the Hook until about five minutes before the collision. I was during this time in the forward part of the vessel on the lookout.

49 Q. Did the captain direct you to be on the lookout?

(Objected to—not as to form.)

A. Yes, sir.

Q. Were you on the lookout whilst you were forward?

(Objected to as leading.)

A. Yes, sir.

Q. Did you, whilst on the look-out, see any, and if so, what lights ahead?

(Objected to.)

A. I saw Barnegat light, which showed dim, being a good ways off—but showed plainly. I saw no other light. The collision took place from one to five minutes after I took the wheel. I saw no light except Barnegat light up to the time of the collision.

Q. What did the captain do after you relieved him at the wheel?

A. I think he jumped on top of the house to the windward. I stood to the leeward of the wheel when I took it.

Q. While he was on the house, did he give you any order as to steering the vessel?

A. I do not recollect as he did, after he got on the house.

Q. When were you first aware that the pilot-boat was ahead of you?

A. I did not know it before the collision. I saw something or other bulge out, just as if a light had been brought up from below, or had come out from behind something that was right ahead; it was a very short time before they came together.

Q. How short a space of time; one minute, one second?

50 A. I shouldn't suppose it was more than half a minute. I put the wheel up as fast as I could, and had not got it hard up when the collision occurred. I had not seen any light from the pilot-boat before; schooner was going to Barnegat to anchor under beach when the collision took place. We were under two-reefed mainsail; two-reefed foresail; fore staysail and jib. I and all the crew had been upon deck from leaving Sandy Hook to the time of collision, except at supper-time, which was about dusk. Attempts made twice or three times to put up lights; the lights failed to burn, owing to the wind blowing so hard, I suppose; the wind blew out our lights, and they would not burn.

Q. Was it for any reason relating to the light that you determined to anchor under Barnegat?

A. Yes, sir. We thought it was prudent to anchor under the beach, as we could not make our lights burn. It was blowing heavy. It was very cold. My hands were swollen up like a pincushion in consequence of cold. Some in house had their hands frozen. All the water that flew froze. I have sailed more or less up and down the coast for thirty years. Never knew of a vessel being anchored where that pilot-boat was. They anchor at the Cedars and under the Gat. It was right in the track of vessels going down the coast, with wind off shore.

Cross:

It is—I don't exactly know—from New York to Sandy Hook may be fifteen or twenty miles; that is my best judgment—somewhere about that; it is—from Sandy Hook to the Cedars may be three or four miles. The Cedars you came to first. The Tavern Houses are about five to six miles to the southeast of the Cedars, and it is about thirty to thirty-five miles from the Tavern Houses to Barnegat. The collision occurred about twenty-two to twenty-four miles to the northward of the Tavern Houses. We took our supper, I can't say whether before or after passing Hook. I can't tell what hour, but think between sundown and dark. I undertook to set lights after leaving Sandy Hook. When I speak of getting outside, I mean outside of Sandy Hook. I

51 don't recollect, can't tell which we did first, the lights or shorten sail, but I think we first attempted to set the lights; that is my best recollection. The lights were lighted by, I can't tell who. They were lighted in the cabin. I can't tell whether the lights got in the boxes before they got out, but think they did. Once we made two or three efforts to light them. This was done under the captain's order, and he saw it done. I think they got in the boxes one time lighted. I don't know but once; they did not—I forget exactly. I think we had taken in or reefed our mainsail before we had the lights. All hands but one man reefed the mainsail; he was on the lookout. I was the man

that was there when the mainsail was being reefed. When reefing that sail the men work around the mainmast and mainboom. That work was done under my directions. I did not help, but gave the orders. In doing it the men worked at it under my direction. I don't know where I stood in giving the order to do the work, but forward.

Q. Was it dark or light when that reefing was done?

A. I think that mainsail was reefed—can't say whether with daylight or not.

Q. Can you give no place or position you were in, when you gave the orders in that work, more than forward?

A. No, sir.

Q. You directed that work, you say, from forward?

A. Yes, sir.

Q. Can you tell me from where forward?

A. No, sir.

Q. How long did that take?

A. I can't tell.

Q. Can you not say within half an hour of how long it took?

A. I should think it took fifteen or twenty minutes, and during that time I was the lookout. No one away from that work. First myself during that time.

Q. Do you mean to swear that you did not put your hands at any time to that work?

A. No, sir; I don't mean to say that.

52 Q. What was next done after the mainsail was reefed?

A. We took in the foresail and two-reefed that.

Q. Under whose direction and orders was that work carried on and done?

A. Under the captain's order and under (his) directions.

Q. You saw that it was being done and was done properly?

A. I gave the directions for them to take it in and reef it. All hands but myself did that.

Q. How long would that take?

A. That took from half an hour to three-quarters.

Q. When that sail was taken in, where did you go to next? The flying-jib and outer jib had been taken in before night?

A. I stood forward.

Q. Did you get any order to see that chain was overhauled and the anchors got ready from the captain?

A. I did; he hallooed and wanted a range of chain overhauled.

Q. When was that, before or after the foresail was reefed?

A. It was after the foresail was reefed.

Q. What were the men at when you went aft?

A. I left part of them overhauling chain, and the other part I told to keep a lookout when I went aft. The chain was being overhauled when I went aft.

Q. Had you be*ing* doing anything to make your hands cold?

A. I had no mittens.

Q. Could you not keep them in your pocket?

A. I did some time.

Q. Could you not all the time?

A. Yes, I could; I was cold then.

Q. When you got aft and took the wheel, the captain, I understand you say, went right in the house?

A. I think so, but I can't say. I think he jumped on the house to windward.

53 Q. Is your memory as good on that point as the rest of your testimony?

A. I can't say.

Q. Repeated.

A. Yes, sir.

Q. Did you see him go into the cabin at all?

A. I did not see him, but that night it was dark; he might have gone.

Q. Were you warm all through when you went to the wheel then?

A. Yes, sir. I am now attached to no vessel, being out of employment since the 15', 16', or 17' up to now. I then left the Wanata at Red Hook discharging. She is now—I declare I don't know. I have no employment.

EDMUND WEEKS.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 31st day of May, 1869, before me.

GEO. FRANCIS DEMAREST,
Notary Public, N. Y. Co.

U. S. district court.

THE SCHOONER WANATA, &C., *ads.* JOSIAH JOHNSON ET AL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

JOHN W. BREWSTER, being duly sworn as a witness on behalf
54 of the claimants, testifies as follows:

I have followed the sea about three years, and was one of the crew of the Wanata at the time of the collision. The collision took place about half or three-quarters of an hour after the foresail was reefed. I took part in reefing the foresail. I went to overhauling chain just as soon as the foresail was reefed and up; did that on main deck between the foremast and top-gallant forecastle.

Q. From where you were could you see aboard of the schooner?

A. Yes, sir.

Q. Did you see anything ahead?

A. Nothing but Barnegat light. Before coming in collision with the pilot-boat I saw the flash of a light; as soon as we struck her I saw the flash of a light, as it might be from the breaking of a sea.

Cross-examination:

Did look over the bows after collision, from forecastle-deck, on the starboard side; saw the flash of a light; saw no other light on her of any kind. We were about fifteen or twenty minutes overhauling the chain; not over that. We were doing that overhauling the chain abreast of the Tavern Houses; could not see the lights of any houses on shore; supposed ourselves four or five miles from shore. The main and foresail w*as* reefed under second mate's orders. The mate was forward lookout; I am sure of that. The only orders the mate gave was to pass the order, and then went forward. He was, when he passed the order for the mainsail—I don't recollect, but I think at the house aft; he was, when he passed the order for the foresail, about midships, that is almost abreast of the mainmast, at the foresail order. The only orders the men got on these jobs from the mate w*as* when he was standing aft or abreast of the

foremast. It was about two or three hours between the reefing of the main and fore sail.

J. M. BREWSTER.

55 Examination taken, reduced to writing, and subscribed and sworn to by the witness this 31st day of May, 1869, before me.

GEO. FRANCIS DEMAREST,
Notary Public, N. Y. Co.

U. S. district court.

THE SCHOONER WANATA }
ads.
JOSIAH JOHNSON ET AL. }

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM H. WORTH, a witness produced, sworn, and examined as a witness on behalf of the claimants, testifies as follows:

I am a sailor, and have been so for ten years. I was one of the hands on board of the Wanata on her voyage in which the collision took place. After getting outside of Sandy Hook the last sail reefed was the foresail; that was finished about half an hour before the collision. About fifteen or twenty minutes afterwards we commenced getting ready the anchor and overhauling the chains; I was engaged in that under the top-gallant forecastle. I could not see, whilst I was engaged in that, over the bows of the schooner. Before that I was walking up and down the starboard side from the carboys (deck-load) to the break of the top-gallant forecastle, on the lookout in general. I saw nothing ahead but Barnegat light; I saw no light from any vessel ahead of us.

56 Cross:

I was assisted in overhauling the chain; the man John Brewster was one; can't tell the other; they were the other two. I can't say if all were engaged on it; I was under the forecastle. One of the other two is up home in the country, and the other has left us. Once overhauled the chain under the second mate's direction. The break of the forecastle four feet from the main deck. I suppose she had a rise or sheer over the forward part of the forecastle, including rail or curve, *was* about a foot. I had been at the foresail. All hands but the captain and mate, with me, had done that work, foresail, under the mate's direction. Had been at the mainsail; the same did that as the foresail—all hands that had been under the mate's direction. He was—I can't say when he directed it, but in the after part of the vessel—somewhere about the wheel. The mainsail was reefed before we set the lights; had not passed Sandy Hook when the mainsail was double-reefed; had passed Sandy Hook when foresail reefed; the lights attempted to be set before reefing of the main and fore sail. The fly-jib was taken, I think, before reefing the mainsail, but can't say; the same applies to the jib taken in. The carboys were the deck-load, and stowed from the after part of the fore-rigging to the after part of the cabin. It is about 15 to 20 feet from the fore-rigging to the back of the top-gallant forecastle. I had been walking up and down there from the time we finished reefing the foresail until I went at the chain.

WILLIAM H. WORTH.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this thirty-first day of May, 1869, before me.

GEO. FRANCIS DEMAREST,
Notary Public, N. Y. Co.

57 GEORGE SPARROW sworn:

One of the owners of the Wanata; on board at time of collision; was going to Charleston in her; were at anchor in North River; started about three p. m. Had 300 tons of guano in hold, and 296 carboys of vitriol on deck; had captain, 2 mates, steward, and 4 men. One of the men disappeared as soon as we reached here; the other one told me he was going out to see his folks in the centre of the State, Essex County; gave me his address, and told me I could send for him any time; have made repeated efforts to find him, and have not up to the present time been able to find him. Top-gallant forecastle is a sort of roof that reaches from knight-heads in neighborhood of 8 feet to windlass; break of it is about 4 feet above deck. If man was short man, and stood midship on deck, he might not see much forward, because vessel has sheer; short man on either side could see forward. Chains were in boxes alongside of foremast each side. The house reaches just abaft of main-hatch to within 6 feet of bulwarks of stern. There is a cock-pit of 6 feet. House 3 feet high; passage-way all around it; passage-way tapers towards stern; grows narrow. Wheel is aft of house, half-way from house to stern in cock-pit; cock-pit is not sunk. Waist of man at wheel is height of house; man at wheel can see forward; best position on vessel for seeing, except at immediate bow. Our vessel had a red and green light, and a white light; the red and green were called globe lights—tin lights; I had purchased them of M'r Miller, in Water street, near Fulton; they are still on the Wanata; been used ever since. She is in port; can't tell the size of the lanterns; they are 12 or 15 inches in height, and 8 or 10 inches across widest part; burned some kind of oil in them. I was most of the time on deck from time vessel sailed till collision. As we went down bay I stood one side of wheel, and the captain the other; occasionally I lent him a hand, as wheel was heavy to

58 move; after we got out aside of Sandy Hook we had supper; after supper they tried to light the lamps; they lit them, and they blew out; it was about dusk; they would go out as fast as they would light them; they were attempted to be set in boxes in forward rigging, about 12 feet above deck; that was repeated several times; they would blow out as fast as they would light them; they tied canvas around them, but they would blow out even then; they double-reefed the mainsail before supper, and it was before reefing the foresail that they tried to light the lights; the wind was so terrific it blew the lights out; beyond the power of human language to describe, so fierce; northwest, or in that neighborhood; a perfect gale; tornado you might call it; that extreme violence of wind continued until after collision; I could not tell at what rate my vessel was going under it; it was bitterly, intensely cold, and very dark; clouds ragged and ugly-looking; unpleasant and threatening as sun went down; not a thick night; clear; sky covered with clouds; black; I did not notice any snow myself; as we went down the coast I saw at different times distant lights up; captain said were on shore; I went down to warm several times; had good fire there; but novelty of situation attracted me to deck; was below at collision; when I last went below I was aware captain was going to Barnegat to anchor; he had told me so; while I was below last before collision, captain came in cabin a few moments and consulted one of his charts; that was a very short time before collision; I heard order to mate at wheel; felt collision; I was sitting; heard mate say to captain, there is a light ahead; captain says, where? mate answered, right ahead; captain ordered mate to put her up; then he said, put her head up; it was blowing so hard captain had to scream; instantaneous after that blow came;

I thought vessel had jibed; first thing I knew man from pilot-boat came in cabin; I knew one of the crew of pilot-boat named Thomas.

59 Q. Did M'r Thomas tell you, while on schooner, what the people on pilot-boat were all doing at time of collision?

(Objected to; ruled out; exception.)

JAMES M. HANCOCK, sworn:

Lantern business; E. D. Miller & Co.; know M'r George Sparrow, by eyesight; I sold him lanterns like these (lanterns shown) in spring of 1869; am familiar with the trade in ship-lanterns; we sold fifty pair of such last month; began selling such just after war closed; it is usual style for small yachts and fishing-smacks; they are not heavy enough for ships.

George Sparrow, recalled:

The lights I bought of Miller were sent on the Wanata, and were the lights used on the night of the accident; these lanterns are such as are used by any of our coasters; the Wanata is 229 tons, new measurement; I saw the top of pilot-boat's masts next morning; the Wanata was almost abeam of her, but further to sea.

Cross-examined:

I did not go aboard the Wanata with these lanterns.

HENRY WILKINS, sworn:

Ship-master; have been for about thirty-five years, out of this port and Philadelphia; familiar with Jersey shore, between Tavern Houses and Barnegat; I have seen fore-and-aft vessels there go within half a mile or mile of shore; I have anchored there as close in as I could get with the water I drew; have seen steamers there go within two or three miles of shore, and sailing-vessels closer.

CHARLES L. MUNSELL, sworn:

Seafaring man for twelve years, since I was fourteen years of age, out of this port; familiar with the Jersey shore, between Tavern
60 Houses and Barnegat; vessels anchor there; familiar with lights ordinarily carried by coasting-vessels; they are such as these.

OCTOBER 4TH, 1870.

M'r Donohue argues for libellants.
M'r J. H. Choate argues for claimants.
M'r Donohue argues in reply.
Points to be handed to the court.

C. A. V.

61 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the 26th day of October, in the year of our Lord one thousand eight hundred and seventy.

Present, the honorable Samuel Blatchford, district judge.

JOSIAH JOHNSON AND OTHERS
vs.
THE SCHOONER WANATA, HER TACKLE, &C. } 22,461.

This case having been heard on the pleadings and proofs, and argued and submitted on briefs and points by the advocates for the respective

parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libellants recover in this action against the schooner Wanata, her tackle, &c., the damages by them respectively sustained by reason of the collision in the pleadings mentioned, viz: The libellant, Josiah Johnson, by the sinking and total loss of the pilot-boat Josiah Johnson, her tackle, apparel, and other furniture, and the libellants, John Carrol, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D—— Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz, William Smith, and George Ellery, by the loss of certain clothing and other
62 property on board of said pilot-boat when sunk and lost by said collision, and also the costs of this action. And that it be referred to a commissioner of this court to ascertain and compute the amount of such damages, respectively, and report thereon to this court with all convenient speed.

SAM'L BLATCHFORD.

Testimony on reference.

United States district court, southern district of New York.

JOSIAH JOHNSON ET AL.
vs.
THE SCHOONER WANATA, HER TACKLE, &C.

OCTOBER 31ST, 1870.

Pursuant to order and notice of reference, proctors for respective parties present.

Reference adjourned to November 5th, 1870, at 11 a. m.

Evidence for libellant.

NOVEMBER 5TH, 1870.

Parties present.

GEORGE W. ROOSEVELT, being called and sworn, says:

63 I am shipwright, caulker, and spar-maker; been in that business for thirty years; I am one of the firm of Roosevelt & Griffith; I am familiar with the condition of vessels and their values in this port; I am part owner of vessels, and I know the pilot-boat Josiah Johnson.

Q. Do you know of any repairs put on this vessel just prior to the cruise on which she was lost?

(Objected to; overruled; exception.)

A. Yes; but not that direct cruise; it might have been a month or more before.

Q. What were those repairs?

(Objected to; overruled.)

A. I won't be positive, (she was in the dock,) what we would call general repairs; put in two new masts; I believe she had a new suit of sails; her condition in every respect was just as good as she could be at that time.

Q. What was she worth at that time?

(Objected to; overruled.)

A. I calculate she was worth $18,000 at that time.

Cross-examination:

I have seen her repeatedly, probably a thousand times; I examined her probably two hours before she sailed on the cruise on which she was lost; I was not requested to examine her with a view to her value, or in contemplation of her loss; the examination was made at the request of the owners; the owner was an old man, and we kept our eyes on her; her tonnage was 143 or 145 tons; don't know her measurements;

64 I could not tell whether there were any sales of pilot-boats in March, 1869, or in the first six months of 1869; that class of vessels are seldom sold; can't remember of the sales of any vessels of any kind in the first six months of 1869; we purchase for ourselves and others interests in vessels which are sold, and we keep familiar with the price of vessels; don't know of the market being depressed in 1869; I cannot tell you about the market-value of vessels in 1869; don't know about the market.

Proctor for respondent moves to strike out the testimony of the witness on the direct, as to the market-value of vessels or the boat in question.

(Objected to; objection sustained.)

GEO. W. ROOSEVELT.

Subscribed and sworn to before me this 9th day of November, 1870.

JOHN A. OSBORN,
U. S. Commissioner.

Adjourned, to be called up on notice.

FEBRUARY 8TH, 1871.

Parties present.

ROWLAND W. GRIFFITHS, sworn, says:

I am a shipwright; partner of Geo. W. Roosevelt; I knew the pilot-boat Josiah Johnson, and know M'r Johnson; I knew her condition prior to her loss; she was in good condition; I am interested in vessels; we are interested in sixty or seventy vessels, ships, brigs, schooners, &c.; at the time of the loss of the Johnson I should put her at $18,000 to $20,000.

65 Cross-examined:

I speak of what she was worth when she was lost. I think she was a little over three years old; I base my judgment on that age. She was about 140 or 150 tons. In the year of 1868 or 1869 I could not say that there were any sales six months before or after her loss. I don't judge from sales of her value, but from the cost of building. The difference in quality between a pilot-boat and schooner is in the finish. There is a superior finish in pilot-boats, a better quality in the rigging and sails. In the build of a schooner they contract it; a pilot-boat is built by day's work or contract, but the pilots hang around and see that the work is done with finish.

Q. What was a schooner, of same age and size, and same material, built by the same builder, worth at the time this vessel was lost?

A. From $16,000 to $18,000. I make a difference of about $2,000; might vary a little more. I put my value on her at the time she was lost; can't say whether it was 1866 and 1867. There was not a heavy decline, that I know of, in vessels generally after 1866 and 1867; none in pilot-boats; there probably might have been in schooners of that size; we are more acquainted with larger vessels.

Q. Do you know what difference, if any, there was in the market price of vessels of any description between the years 1866, 1867, and the spring of 1869?

A. I don't know that there was any; I don't know of the sales of any pilot-boat at any time; I don't know that I ever myself knew of the sale of any pilot-boat.

Redirect:

Pilot-boats are peculiar in model.

Recross:

66 The peculiarity is in the sharpness. It would increase the expense, but to what amount I can't say, by building it in this sharp way.

R. W. GRIFFITHS.

Subscribed and sworn to before me this 8th day of February, A. D. 1871.

JOHN A. OSBORN,
U. S. Commissioner.

JULY 19TH, 1871.

Proctors for respective parties present, and proctor for claimants asks to have the reference adjourned to Tuesday, July 25th, at 10 a. m.

JULY 25TH, 1871.

Parties present.

Claimants call as a witness E. F. WILLIAMS, who, being duly sworn, says:

I live at Greenpoint, Long Island; my business is ship-builder; been engaged at that business for about twenty-six years. I have built all kinds of vessels. I have owned interests in vessels; bought and sold vessels. I have seen the pilot-boat Josiah Johnson which was lost in 1869; I saw her when she was building in 1863; I have seen her since that time.

Q. What, in your opinion, was the value of that vessel in 1869?

A. I don't know that I know enough about her to form an opinion, as I did not know her condition then. I saw her in the summer of 1868 down the bay. I can give a scattering answer as to her value in 1868, as I do not know her condition, whether she was coppered or not, or her sails new, but I should say she was worth about $10,000.

67 The market for vessels of that description was lower in 1869 than in 1863. The depreciation on the Johnson from 1863 to 1869 would be about 5 per cent. per year. I don't know what she did actually cost.

Cross-examined:

I made no examination of her since her being built. I built the Wanata; I did not own any interest in her; sold entire interest to M'r Sparrow. I built pilot-boat William Bell in 1869; she was a little smaller than the Johnson; I think the Bell was very much more expensive boat. I furnished the hull and spars of the William Bell; built her for the Sandy Hook pilots; M'r Callahan made the contract with me. I know a M'r Henderson, a pilot. There was very little difference in the price of timber between the year 1863 and the year 1869. Ship-carpenters' prices in 1863 were $2.75 per day; in 1869, from $2.25 to $2.75, ten hours per day, same as 1863. My contract for building the

hulls and spars, William Bell, was $8,000; that was all I got for her. I estimate for ballast and stores in estimating the value to the Johnson; I took her ballast to be about $600.

Redirect:

There was a greater demand for vessels in 1863 than 1869. I don't recollect how the price of copper and iron compared in 1863 with that in 1869. The Bell was made of more costly materials and better finished than the Josiah Johnson; she was a costlier vessel to build.

Recross:

The Bell was extensively finished with mahogany, and also a great deal of copper work.

E. F. WILLIAMS.

Subscribed and sworn to before me this 25th day of July, 1871.

JOHN A. OSBORN,
U. S. Commissioner.

EDWARD BEDELL, sworn, says:

68 I live at Glenwood, L. I.; business is ship-carpenter; been such for 28 years. I have built barks, brigs, schooners, sloops, and all kinds of vessels. I have owned interests in vessels; bought and sold vessels. I saw the pilot-boat Johnson on the stocks when she was building, but have not seen her since. I don't think there was any difference in the market for vessels in 1863 and 1869 in my line with me there. The depreciation of a pilot-boat from 1863 to 1869 would be difficult to say; in coasting-vessels about 10 per cent., and, in my judgment, for pilot-boats about 6 to 7 per cent. per year, making a depreciation for the cost price of about 35 to 40 per cent.

Cross-examined:

I built no pilot-vessels in 1869, nor from 1863 to 1869 never built any pilot-boats. I never was present at the sale of any pilot-boats. I saw her on the ways at Greenpoint.

Redirect:

Do you know the manner of building pilot-boats, wherein they differ from the vessels which you have been in the habit of building?

A. I do know.

Q. Have you been in the habit of seeing pilot-boats?

A. Yes, sir.

Q. Have you seen the influence of the wear and tear on them?

A. Yes, sir.

Recross:

Q. Will you tell me the name of any boat you saw it on?

A. I don't know any one particular.

EDWARD BEDELL.

Subscribed and sworn to before me this 25th day of July, 1871.

JOHN A. OSBORN,
U. S. Commissioner.

69 HENRY STEERS, sworn, says:

I live in New York. I am a ship-builder; been such for about 20 years. I have built steamers, yachts, pilot-boats, every kind of vessel almost. I saw the Josiah Johnson when she was building. Have seen her four or five times since, but not to know anything about her

condition. Her depreciation from her cost price, from 1863 to 1869, would be about 30 per cent.

Cross-examined:

That would be the ordinary depreciation. It depends altogether, too, upon the condition in which she is kept. Carpenters' wages in 1869 were $3.50 per day. The strike was in 1867 and 1868; then the wages were the highest. Ten hours was a day's work in 1869. I built no pilot-boat in 1869.

Redirect:

All ship-carpenters do not receive the same wages; some receive more than others.

Q. What, in your opinion, was the Josiah Johnson worth in 1869? (Objected to.)

A. From what I know of her I should say she was worth $10,000.

HENRY STEERS.

Subscribed and sworn to before me this 25th day of July, 1871.

JOHN A. OSBORN,
U. S. Commissioner.

AUGUST 11TH, 1871.

JOSEPH B. VANDUZEN, sworn, says:

I am a ship-builder in New York; have been for 23 years; firm formerly J. B. & J. D. Vanduzen. During that period I have been
70 acquainted with the ruling values of vessels of the various classes in this port. I know the pilot-boat Josiah Johnson. I saw her while she was being built.

Q. Supposing her to have been subject to ordinary wear and tear in the spring of 1869, what would have been her market value in New York?

A. She was built in 1863?

Q. Yes.

A. I don't know when she was built. If she was built in 1863, it makes a difference what part of the year she was built. If she was built in the spring of 1863 it would make her about 6 years of age, and I should say that the vessel had depreciated, taking the average of vessels of that class or kind, 5 per cent. per year, and that very much depends how it is kept in order.

Q. What was the course of the market value of vessels, including pilot-boats, from the spring of 1863 to March, 1869?

A. I should say that a vessel of that class could have been built for 10 per cent. less in 1869 than in 1863.

Q. Can you say that there would have been a corresponding difference in the market value of vessels of that class between these two periods?

A. There certainly should be.

Q. Was there such a difference?

A. There was.

Q. What was the value of the Johnson at the time you saw her built?

A. At the time I saw her she was not completed, and her true value was not ascertained.

Q. What was her value when finished in 1863, if finished in the ordinary course and in the usual style of pilot-boats in this port?

(Objected to.)

71 A. I don't know the definite size of the vessel; her actual size and dimensions or tonnage. I know very nearly; as far as my judgment serves me she must have been about 125 to 130 carpenters' measurement, and from 115 to 120 old measurement. I should think her value at that time, 1863, about $14,000. If she was kept in ordinary repair, and subject to ordinary wear and tear, taking her to be 6 years of age, at 5 per cent. depreciation, I estimate her value in 1869 at $9,800.

Q. Have you in that estimate taken into consideration the decline in market value of all vessels?

(Objected to.)

A. I have not.

Q. What deduction would you make for that?

(Objected to.)

A. I would say that if the vessel had been repaired quite recently before she was lost, the amount of money expended at that time might be far greater than the depreciation between 1863 and 1869, and it might be far less.

Q. But without any such special consideration, what further deduction would you make?

A. If I make the deduction of 10 per cent., the difference between the cost of building the vessel between 1863 and 1869 would place the value of the vessel in 1869 $8,820, which I should consider cheap or reasonable.

Q. Which do you mean, cheap or reasonable?

A. I should say very fair.

Cross-examined by Donohue:

I have no ship-yard at present time. It is about three years since I had one. The last one we had was at Greenpoint, Long Island. For the last three years I have been engaged in ship-building at
72 Chester, P'a, and at Greenpoint, New York; not on my own account, but superintending for others; superintending the construction of a float for the city and county of New York. Constructed no other in New York for the last three years. Constructed one vessel, yacht Columbia, at Chester, P'a, within the last three years. I would say that I superintended for the Spanish government fifteen gunboats in New York and fifteen at Mystic, Connecticut. I saw the Johnson when she was building. I forget the name of the builder; I know him very well. She was built in Brooklyn.

Q. What part of Brooklyn?

A. Eastern district.

Q. Can you give no other or particular account as to where she was built than in the eastern district?

A. I could not. I do not know that the eastern district of New York included Greenpoint in 1863.

Q. How many ship-yards were there in Brooklyn and Greenpoint in 1863?

(Objected to as immaterial.)

A. Seven, eight, or nine, or more; our ship-yard was at the foot of Sixteenth street to Eighteenth street.

Q. Can you give me no further or particular statement of where the Josiah Johnson was constructed than you have already given?

A. Not positively, I could not.

Q. Does not the value of the vessel, both as to market value and her intrinsic value, depend upon her condition?

A. It does very much so.

Q. Can you tell me any time or place that you saw the Johnson after that?

A. I cannot.

Q. Suppose the Johnson, taking her, as you have already assumed, to have been put in complete order just prior to the collision—new masts, rigging, and all useful repairs—can you give us now a correct idea
73 of her value, without having seen her so repaired?

A. I am not able to give an opinion, not having seen her; I built the pilot-boat J. D. Jones in 1857, the W'm H. Aspinwall about 1860, I think, and the pilot-boat Perkins in 1867–8; besides these I have never been present at the sale of any pilot-boat or part of a pilot-boat; I have no knowledge of the amount of the sale of any pilot-boat from 1863 to 1869, except what I know of those I built.

Q. In making your estimate of the presumed deterioration you have assumed it to be for six years, and have made five per cent. on her original value, have you not?

A. I have.

Q. Was labor more or less in 1869 than in 1863?

A. Less in 1869, and I take it as less in estimating the value of the vessel.

J. B. VANDEUSEN.

Subscribed and sworn to before me this 11th day of August, 1871.

JOHN A. OSBORN,
U. S. Commissioner.

WILLIAM H. WATERBURY, sworn, says:

I am spar-maker in this city, for myself since 1853.

Q. Are you familiar with the construction and character of pilot-boats and other vessels?

A. I have seen several of them built.

Q. Have you, for the past ten years, been acquainted with the market values of vessels, including pilot-boats, in this market?

A. I consider myself so; have built in many vessels; no interest in pilot-boats; I have seen the pilot-boat Johnson frequently.

Q. What, in your judgment, was her value in March, 1869?

74 A. I should say her value was between $8,000 to $10,000, from what I saw of her; I did not know her condition.

Q. What was the course of the market-value of vessels from 1863 to 1869?

A. They were rising or falling, according to the demand for particular vessels.

Q. Can you tell what would have been the ordinary depreciation of the value of the Johnson from 1863 to 1869, supposing her to be subject to the ordinary wear and tear, and to have been kept in ordinary repair?

A. That would be all owing to the condition of the vessel; we calculate five per cent. ordinarily.

Cross-examination:

My attention was first called to this just after the collision; M'r Sparrow and M'r Johnson called my attention. I saw her a trip or two before the collision; my impression is that the last time I saw her she was at anchor under Brooklyn Heights; nothing particular to call my attention. I can't form a judgment of the value of a vessel unless I examine her; that is, a purchasing or selling judgment of her value; her value

depends upon her condition and the business engaged in; the five per cent. depreciation is based upon her net original cost.

Q. Then, at the end of twenty years, you consider her worth nothing?

A. I consider her worth what I can get for her.

Q. Do you mean to say that if a vessel's timber is kept sound by repair or replacing her planks; by replacing when needed; her sails and mast by replacing when needed, do you mean to say that she depreciates five per cent. a year?

A. I do, sir.

Q. So that if a vessel was kept with her timbers sound, by replacing, and her masts and sails in order by replacing, at the end of twenty years she would be worth nothing?

A. No; what she would bring.

75 Take a vessel twenty years old, with her timbers, bolts and planking renewed when necessary, to keep her in good order, and her sails and masts renewed, when necessary to keep her in good order, can you give me any estimate of her value?

A. I cannot without examining her.

Q. Do you know of the sale of a pilot-boat in 1868 or 1869, or 1866 or 1867?

A. I do not; they are generally built for that business, but lately one or two yachts have been bought for them; they are a peculiar vessel.

W'M H. WATERBURY.

Subscribed and sworn to before me, this 11th day of August, 1871.

JOHN A. OSBORN,
U. S. Commissioner.

Adjourned to August 18th, 1871, at 1 p. m.

Evidence for claimants.

NOVEMBER 22D, 1871.

Parties present.

GEO. G. COLLIS, sworn, says:

I live in New York. I knew the firm Collis & Mitchell; I was clerk in their store; that firm has ceased to exist. I was there at the time the outfits were being furnished for the pilot-boat Johnson; that firm furnished her outfits; they also paid her general bills, receiving money from Captain Johnson, and paid it to other people on his orders, and taking receipts from the persons paid. I have examined the books of the late firm of Collis & Mitchell, to ascertain from them the amount of ship-chandlery which they furnished to pilot-boat Josiah Johnson.

Q. What was the amount?

(Objected to, as the books should be produced; objection sustained.)

Adjourned to Monday, November 27th, 1871, at 12 m.

76 *Notice of reference.*

District court of the United States, for the southern district of New York.

JOHN W. AVERY AND OTHERS
vs.
SCHOONER WANATA, &C.

In conformity with the order entered in the above-entitled cause, you

will please to take notice that the reference ordered therein will be proceeded with before me (a commissioner duly appointed by the circuit court of the United States, for the southern district of New York, under and by virtue of the acts of Congress in such case made and provided) at my office, at the United States court buildings, at 41 Chambers street, in the city of New York, on the sixteenth day of March, 1872, at 10½ o'clock in the forenoon of that day, at which time and place you are hereby notified to attend, with the testimony you may have to offer in the matter referred.

Dated New York, the 11th day of March, A. D. 1872.

Yours, &c.,

JOHN A. OSBORN,

United States Commissioner, duly appointed by the Circuit Court of the United States for the southern district of New York, in the second circuit.

To EVARTS, SOUTHMAYD & CHOATE, esqrs., *for cl'm't.*

77 MARCH 16TH, 1872.

Pursuant to notice of reference, present M'r Donohue for libellants, and no one appearing for respondent the commissioner adjourns the reference to March 21st, 1872, at 10 a. m.

MARCH 21ST, 1872.

Pursuant to notice parties present, and reference adjourned to March 26th, 1872, at 10 a. m.

MARCH 26TH, 1872.

Pursuant to notice present proctors for respective parties.

Mr. Tweed moves to adjourn, on the ground that a witness has been subpœnaed and he has not appeared.

The commissioner adjourns the reference to April 3d, 1872.

APRIL 3D, 1872.

Parties present.

GEORGE G. COLLIS recalled:

I was subpœnaed to produce books of Collis & Mitchell containing the account of the outfit of the Josiah Johnson, and I now produce them.

Cross-examined:

Those entries are not in my handwriting. I was not one of that firm.

Redirect:

The firm consisted of W'm E. Collis and W'm L. Mitchell. Those gentlemen are not living now, neither of them. I was in their employ when they furnished the outfit of the Josiah Johnson. I was clerk for them. I was in the habit from time to time of making entries in
78 some of their books—in the blotter and journal. The book now produced is what is called the "Ship Ledger." I find that I made some entries in this book in November, 1864. I knew of the outfits of the Josiah Johnson in the course of my business as clerk for Collis & Mitchell. There were some goods furnished to the Josiah Johnson after November, 1864. Those entries are in my handwriting. The entries prior to November, 1864, are in the handwriting of M'r Mitchell, now deceased. M'r Mitchell died before M'r Collis. M'r Collis died about a

year after M'r Mitchell. I am not the administrator of M'r Collis' estate. His widow and Joseph M. Price were the administrators, but M'r Price has since died, leaving his widow the sole surviving administrator of M'r Collis. I am able to state that this is the ship's book used by Collis & Mitchell during the time indicated by the entries in the book. The book begins from January, 1862, down to some time in 1865. I saw this book used as their ledger during all this time. After my father's death I bought the stock and debts and books of Collis & Mitchell. I have had the custody of this book ever since, and it remains unaltered, so far as I know.

Q. The entries in the book in your handwriting, are they or not correct statements of what they purport to represent?

(Objected to.)

A. Yes.

Cross-examined:

All the entries in this book are simply extracts and transcripts from other books.

Redirect:

These are taken from the order-book. Collis & Mitchell kept a ship's ledger, order-book, cash-book, petty-ledger, and large ledger. The original entries were made in the order and cash books. The other books contained merely transcripts and extracts from the order and cash books.

Adjourned to Saturday, April 6th, at 11 a. m.

79 APRIL 6TH, 1872.

Parties present. Claimant recalls George G. Collis:

I have produced the books of Collis & Mitchell containing the original entries of these transactions during the year 1863. This book is the order-book of Collis & Mitchell used at that time.

Q. Does that book contain entries of supplies and ship-chandlery furnished to pilot-boat Josiah Johnson in 1863?

(Objected to.)

A. It does.

Q. Turn to the entry in the book of supplies furnished to Josiah Johnson.

(Objected to.)

A. I now turn to it.

Q. Were the supplies indicated by that entry furnished to Josiah Johnson?

(Objected to by libellants' counsel and ask to cross-examine the witness before he answers.

The commissioner rules to allow the witness to be cross-examined as to his knowledge.)

A. The entry in the book is not in my handwriting. I can't remember the amount or the articles being furnished to the pilot-boat Josiah Johnson outside of the book.

By counsel for claimant:

The entry is in the handwriting of W'm L. Mitchell. The book was kept in 1863 in the office of Collis & Mitchell. I was in the habit of making entries in this book in 1863.

Q. Were you or not familiar with the business that was carried on by them at that time?

80 A. The general business; yes, sir.

Q. Was this book kept and did it remain in your custody in the same manner as the ship's ledger did, as you have testified to before?

(Objected to as leading; exception.)

A. Yes, sir.

Q. Were you in the habit of seeing this book and the entries made in it while you had still a fresh recollection concerning the transactions of that irm?

(Objected to as leading and immaterial. Counsel for claimant states that he expects to prove by this evidence what the expense was of building and fitting out the pilot-boat Josiah Johnson. Libellants object to proof of the cost of building, the question being what she was worth when lost. Objection sustained.)

Claimants offer to prove the actual cost of the vessel at the time of her construction, and to show that that was less than the amount claimed by the libellants as her value at the time of her loss, and further offer to show this actual cost as evidence bearing upon her market value at the time of the collision. This offer is made independently and also in connection with the testimony previously introduced by them concerning the course of the market during the intervals between her construction and loss, and also concerning the depreciation of this vessel during that period.

(The offer objected to by M'r Donohue and objection sustained, and counsel for claimants appeals from the ruling of the commissioner to the court for its decision thereon.)

I think the evidence offered and objected to is inadmissible.
April 22d, 1872.

SAMUEL BLATCHFORD,
District Judge.

81 The libellants' counsel calls HERO A. SCHULTZ, who, being duly sworn, says:

I am a sailor. I was attached to the pilot-boat Josiah Johnson, and was on board of *of* her at the time she was lost. I lost by her sinking my clothing. I made a list of it. I have the list, and now produce it. The total value of the clothing lost was $144.50.

List put in evidence, marked "Exhibit No. 1, J. A. O."

Cross-examined:

The value put on these clothes was what they were worth at the time, and not what they cost me.

HERO H. SCHULTZ.

Subscribed and sworn to before me this 3d day of April, 1872.

JOHN A. OSBORN,
U. S. Com.

Adjourned to April 6th, 1872, at 12 m.

Adjourned to April 27th, 1872, at 10 a. m.

Adjourned to May 2d, 1872, at 2 p. m.

MAY 2D, 1872.

Parties present.

CHARLES MILLER, called and sworn, says:

I was on the Josiah Johnson at the time of collision, and lost my clothing by the collision; had no time to save them. The list

82 annexed, marked "B," contains a true statement of the clothes lost; the value stated was at the time of the loss.

Evidence for libellants.

MAY 4TH, 1872.

JOHN CARROLL, sworn, says:

I was one of the parties on board of the Josiah Johnson at the time she was lost.

(Paper shown witness.)

I lost clothing when she was lost. This paper is a list of my clothing lost, and value at the time of the loss. I never got any of them back.

(Put in evidence, marked "Exhibit No. 3, J. A. O." The value is $100.00.)

JOHN CARROLL.

Subscribed and sworn to before me this 4th day of May, 1872.

JOHN A. OSBORN,
U. S. Comm'r.

JOSIAH J. RUSSELL, sworn, says:

I was on board of the Johnson at the time of the collision with the Wanata, and lost some clothing and a quadrant by her sinking. I have a list of the articles lost owned by me, (Exhibit No. 4, J. A. O.) I lost all the articles mentioned on the list, with the exception of the quadrant. The value of the articles is correct—their value at the time of the loss.

83 Cross-examined:

They all belonged to me, and never recovered any of them.

JOSIAH J. RUSSELL.

Subscribed and sworn to before me this 4th day of May, 1872.

JOHN A. OSBORN,
U. S. Comm'r.

DANIEL GILLESPIE, sworn, says:

I was boat-keeper on the Josiah Johnson, and was on her at the time of the collision. I lost clothing. I have a list of it, marked "Exhibit No. 5, J. A. O." I lost all mentioned on the list, (Exhibit No. 5.) They were worth more than is stated on the list. I know Josiah J. Russell, the last witness. He had a quadrant on board, which was lost. I could not swear what it was worth, but I could not buy one as good, or equal to it, for $20.00.

Cross-examined:

There were three quadrants on the vessel at the time of collision. The quadrant of Russell's was worth $20.00; it was an old one—a French quadrant. I should judge from its appearance that it had been used. I would have given $20 for it, and consider it well worth it.

DANIEL GILLESPIE.

Subscribed and sworn to before me this 4th day of May, 1872.

JOHN A. OSBORN,
U. S. Comm'r.

ALEXANDER M. COCHRAN, sworn, says:

I was one of the crew of the Johnson at the time of collision with the Wanata. I lost clothing by the sinking of the Johnson. I have a list, No. 6, J. A. O., hereto annexed. The value mentioned on the list is the lowest value.

84 Cross-examined:

I am 26 years old.

ALEX. M. COCHRAN.

Subscribed and sworn to before me this 4th day of May, 1872.

JOHN A. OSBORN,
U. S. Comm'r.

ISAAC CAMPBELL, sworn, says:

I was on the Josiah Johnson at the time of the collision with the Wanata. I lost clothing by the collision. This is the list, marked "Exhibit No. 7, J. A. O." The clothes that I lost was worth the prices stated on the list.

Cross-examined:

The overcoat cost me $55.00 that fall; it was as good as new. I was on the boat at the time of the collision.

ISAAC CAMPBELL.

Subscribed and sworn to before me this 4th day of May, 1872.

JOHN A. OSBORN,
U. S. Comm'r.

JULY 10TH, 1872.

Proctors for respective parties present.
Libellants close.
Adjourned to Monday, July 15th, 1872, at 12 m.

85 JULY 15TH, 1872.

Reference adjourned to Wednesday, July 17th, 1872.

JULY 17TH, 1872.

Pursuant to adjournment, M'r Donohue, for libellants, and no one appearing for respondent, M'r Donohue asks to go on with reference.

JAMES BRITTON, sworn for libellants, says:

I was not on board of the Josiah Johnson at the time of collision. I lost my clothing which was on board. The annexed paper, marked "A, July 17th, 1872," contains a statement of the loss of clothes, and their fair value at the time. None of the clothes have been recovered and no part of their value paid to me.

JAMES BRITTON.

Subscribed and sworn to before me this 17th day of July, A. D. 1872.

JOHN A. OSBORN,
U. S. Comm.

ROBERT HAMILL, sworn, says:

I was not on board of the Johnson at the time of the collision. I was attached to her, but not on board then. I had clothing on board. The

annexed paper, marked "Exhibit B, July 17th, 1872," contains a statement of the articles, and a low estimate of their value at the time of collision. None of the clothes were recovered and no part of their value has been paid.

ROBERT HAMILL.

Subscribed and sworn to before me this 17th day of July, A. D. 1872.
JOHN A. OSBORN,
U. S. Comm'r.

86 JAMES R. ELCOCK, sworn, says:

I was on board of the Josiah Johnson at the time of the collision, and belonged to her. I lost clothing and other articles on board; also, $5.00 bill in the pantaloon pocket. The annexed statement, marked "Exhibit C., J. A. O., July 17th, 1872," contains the number of articles, and their fair value at the time of the loss.

JAMES R. ELCOCK.

Subscribed and sworn to before me this 17th day of July, 1872.
JOHN A. OSBORN,
U. S. Comm'r.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Thursday, the 29th day of February, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Samuel Blatchford, district judge.

JOSIAH JOHNSON AND OTHERS
vs.
THE SCHOONER WANATA, &C. } 22467.

On reading and filing a consent signed by the proctors for libellants and claimants,

87 Ordered, that the libel filed in this action be amended by striking out the name of Josiah Johnson wherever the same occurs, and inserting in lieu thereof the names of John W. Avery, William A. Avery, and William H. M. Johnson, executors of Josiah Johnson, deceased; said Josiah Johnson having departed this life since the filing and entry of the interlocutory decree herein.

U. S. district court.

JOSIAH JOHNSON AND OTHERS
vs.
THE SCHOONER WANATA, &C.

We consent that the libel be amended herein by striking out the name of Josiah Johnson wherever the same occurs, and putting in lieu thereof John W. Avery, William A. Avery, and William H. M. Johnson, executors of Josiah Johnson, deceased, said Josiah Johnson having died since the interlocutory decree herein.

Dated Jan. 23d, 1872.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Libellants.
BEEBE, DONOHUE & COOKE,
For Defendants.

Let an order be entered in conformity with the above consent.

SAM. BLATCHFORD.

N. Y., FEB. 29, 1872.

88 *Commissioner's report.*

United States district court for the southern district of New York.

JOSIAH JOHNSON ET ALS.
vs.
THE SCHOONER WANATA, HER TACKLE, ETC.

In pursuance of a decretal order made in the above-entitled cause on the 26th day of October, in the year of our Lord one thousand eight hundred and seventy, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellant, Josiah Johnson, by reason of the sinking and loss of the pilot-boat Josiah Johnson, in the pleadings mentioned, and to ascertain and compute the amount of damages sustained by the libellants John Carroll, William Qualey, Isaac Campbell, James R. Eliott, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochrane, Charles Miller, Hero A. Schultz, William Smith, and George Ellery, by the loss of certain clothing and other property on board of said pilot-boat—when sunk and lost—by said collision, and to report thereon to this court with all convenient speed,

I, John A. Osborn, the commissioner to whom the matter was referred, do report that I have been attended by the proctors for the libellants and claimants, and the witnesses, and have taken and examined the testimony offered in support of the libellants' claims aforesaid, and do find as follows:

89	To Hero H. Schultz, for clothing lost by the collision	$144 50	
	Interest thereon from March 6th, 1869	37 55	
			$182 05
	To Charles Miller, for clothing lost by the collision	$95 25	
	Interest thereon from March 6th, 1869	24 73	
			119 98
	To John Carroll, for clothing lost by the collision	$100 00	
	Interest thereon from March 6th, 1869	26 09	
			126 09
	To Josiah J. Russell, for clothing lost by the collision	$132 00	
	Interest thereon from March 6th, 1869	34 44	
			166 44
	To Daniel Gillespie, for clothing lost by the collision	$125 00	
	Interest thereon from March 6th, 1869	32 61	
			157 61
	To Alexander M. Cochran, for clothing lost by the collision	$73 25	
	Interest thereon from March 6th, 1869	19 11	
			92 36
90	To Isaac Campbell, for clothing lost by the collision	$182 25	
	Interest thereon from March 6th, 1869	47 55	
			229 80

To James Britton, for clothing lost by the collision.	$50 00	
Interest thereon from March 6th, 1869	13 04	
		63 04
To Robert Hamill, for clothing lost by the collision.	$56 00	
Interest thereon from March 6th, 1869	14 60	
		70 60
To James R. Elcock, for clothing, etc., lost by the collision	$77 00	
Interest thereon from March 6th, 1869	20 09	
		97 09
		$1,305 06

As to the damage sustained by the libellant, Josiah Johnson, owner of the pilot-boat Johnson, which boat was lost by reason of the collision, I report as follows:

The evidence furnished by the libellants as to value of said pilot-boat at the time of her loss I must regard as more competent and of a better grade of proof (by reason of the witness having repaired the boat just prior to her loss, and being acquainted with the boat and
91 knowing her condition thoroughly) than the testimony offered by claimant's witness whose knowledge of said pilot-boat partakes more of the nature of estimate or conjecture by reason of an imperfect knowledge of her condition at the time and for a considerable period before her loss.

Having therefore considered the evidence in all its bearings as to value, I report her value to have been, at the time of her sinking, at least fifteen thousand dollars, but as the proctor for libellant stated, on the reference, that the bond given by claimants for the release of the schooner Wanata being only for sixteen thousand dollars, he requested the commissioner to adjust the value of said pilot-boat to such an amount as will, together with the value of the clothing lost, make up the sum of sixteen thousand dollars, provided the commissioner concludes that the value of the said boat was in excess of fifteen thousand dollars at the time of her sinking.

I report the value of the Josiah Johnson, under the foregoing terms, to be fourteen thousand six hundred and ninety-four dollars and ninety-four cents, ($14,694.94.)

All which is respectfully submitted.

JOHN A. OSBORN,
U. S. Comm.

NEW YORK, *Nov.* 26, 1872.

92 *Claimant's exceptions to commissioner's report.*

United States district court, southern district of New York.

JOSIAH JOHNSON ET AL.
vs.
THE SCHOONER WANATA, HER TACKLE, &C.

George Sparrow and David L. Turner, claimants in the above-entitled cause, except to the report of the commissioner heretofore filed therein upon the following grounds, viz:

First. For that the amount reported by said commissioner as the value of the pilot-boat Josiah Johnson at the time of the collision in the pleadings mentioned, to wit, the sum of fourteen thousand six hun-

dred and ninety-four dollars and ninety-four cents, ($14,694.94,) is erroneous and excessive.

Second. For that the value of said pilot-boat at the time of the said collision did not exceed ten thousand dollars.

Third. For that the rejection of the evidence offered on behalf of said claimants to prove the cost of said pilot-boat was erroneous.

Fourth. For that the rejection of the evidence offered in behalf of the said claimants to prove the cost of said pilot-boat in connection
93 with evidence concerning the course of the market during the interval between the time of her construction and the said collision and with evidence concerning the depreciation of the said pilot-boat during that period was erroneous.

Fifth. They except to the several allowances made by said report to Josiah J. Russell, for that the said Russell is not one of the libellants in said cause, and the making of any such allowances to him is not within the matters referred to the said commissioner.

Sixth. They except to the several allowances made to James Britton, for that the said Britton is not one of the libellants in said cause, and the making of any such allowances to him is not within the matters referred to the said commissioner.

Seventh. They except to the several allowances made to Robert Hamill, for that the said Hamill is not one of the libellants in said cause, and the making of any such allowances to him is not within the matters referred to the said commissioner.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Claimants.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The petition of Josiah J. Russell, James Britton, and Robert Hamill respectfully shows:

That heretofore Josiah Johnson and others filed their libel in this court to obtain compensation for the loss of the pilot-boat Josiah Johnson, her tackle, &c., and the property on board of her.

That these libellants composed a part of her crew at the time of the loss, and had clothes on board, but were absent from the vessel when lost, and by accident their names were left out of the libel, although intended to be inserted.
94 That the proof of the loss was made before the commissioner and a report has been duly made in this cause.

That your petitioners pray that their names may be added as libellants herein, and that they may have the same right as if originally made parties.

BEEBE, DONOHUE & COOKE,
Proctors for Petitioners.

GENTLEMEN: Please to take notice that we shall present the within petition to the district court of the United States for the southern district of New York on the 14th day of December, 1872, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order making said petitioners co-libellants, or for such relief as may be just.

Dated December 12, 1872.

Yours, &c.,

BEEBE, DONOHUE & COOKE,
For Petitioners.

To EVARTS, SOUTHMAYD & CHOATE,
For Resp't.

95 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Saturday, the first day of February, in the year of our Lord one thousand eight hundred and seventy-three, (1873.)

Present, the Hon. Samuel Blatchford, district judge.

JOHN W. AVERY, WILLIAM A. AVERY, AND William H. M. Johnson, executors of Josiah Johnson, deceased, libellants, and other libellants,
vs.
THE SCHOONER WANATA, HER TACKLE, &C. } 22–461.

This cause having been heard on exceptions taken by the claimants to the commissioner's report herein, and the 5th, 6th, and 7th exceptions having been allowed and all the other exceptions overruled, and said 5th, 6th, and 7th exceptions having been subsequently overruled by an order of the court on a petition filed, allowing Josiah F. Russell, James Britton, and Robert Hamill to be made libellants in said action,

On reading the report on file of John A. Osborn, United States commissioner, to whom the above matter was referred, by which there is reported due the libellants for loss of pilot-boat Josiah Johnson,
96 clothing, and interest, the sum of sixteen thousand dollars,

On motion of Beebe, Donohue & Cooke, proctors for the libellants, it is ordered that the report be in all things confirmed, and that the libellants recover in this action against the schooner Wanata, &c., the amount reported due, together with their costs to be taxed, which have been taxed at the sum of three hundred and five dollars and twenty-seven cents, and that the said schooner Wanata, her tackle, &c., be condemned therefor.

And on like motion it is further ordered that out of the proceeds of the claimants' stipulations for costs and value when paid into the registry of the court, the clerk of this court pay to the libellants herein, or their proctors, the amount reported due, with interest thereon from the date of this decree, together with their taxed costs.

And on like motion of Beebe, Donohue & Cooke, proctors for the libellants, it is further ordered that unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the clerk, upon such payment into court, after deducting therefrom the taxed costs of the officers of court, distribute the proceeds in satisfaction of this decree.

SAMUEL BLATCHFORD.

97 United States district court, southern district of New York.

JOHN W. AVERY ET AL.
vs.
SCHOONER WANATA, HER TACKLE, APPAREL, and furniture, &c.

Take notice, that the claimants in the above-entitled cause intend and do hereby appeal to the next circuit court of the United States for the southern district of New York from the final decree entered in said

cause on the first day of February, 1873, and from each and every part of such decree.

New York, February 3, 1873.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE.
Proctors for Claimants.

To GEORGE F. BETTS, Esq.,
Clerk U. S. Dist. Court, So. Dist. of New York.
BEEBE, DONOHUE & COOKE, *Proctors for Libellants.*

98 Circuit court of the United States, southern district of New York.

JOHN W. AVERY, WILLIAM A. AVERY, AND William H. M.Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz William Smith, George Ellery, Josiah J. Russell, James Britton, and Robert Hamill, libellants and appellees,
against
THE SCHOONER WANATA, HER TACKLE, APPAREL, and furniture, George Sparrow and David L. Turner, claimants and appellants.

To the honorable the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

The appeal of the above-named appellants respectfully showeth: That on the 8th day of March, 1869, Josiah Johnson, John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz, William Smith, and George Ellery exhibited their libel in the district court of the United States for the southern district
99 of New York against the said schooner Wanata, her tackle, apparel, and furniture, praying, among other things, for the reasons set forth in said libel, that the said court would pronounce for the claims in said libel set forth, and would condemn the said schooner and all persons intervening for their interests therein, with costs.

That on the 11th day of March, 1869, George Sparrow and David L. Turner appeared in said suit, and entered and filed their claim to the said propeller (schooner) and a stipulation for the costs of said suit, and a stipulation for sixteen thousand dollars, the value of said schooner, pursuant to the course and practice of said district court.

That on the 21st day of May, 1869, the said claimants of the said schooner filed their answer to the said libel in said district court, praying that the said libel be dismissed and the said libellants condemned in costs.

That the said cause came on to be heard before the honorable Samuel Blatchford, judge of the said district court, on the 21st day of May and the 1st day of June, 1870, upon the testimony and proofs, previously taken therein, and the testimony and proofs then adduced by the respective parties; and the said judge having advised thereon, afterwards, on the 26th day of October, 1870, made a decree or sentence in

said cause, whereby it was sentenced and decreed, among other things, that the libellants recover against the said schooner Wanata, her tackle, &c., the damages by them respectively sustained by reason of the collision in the pleadings mentioned, and also the costs of said action; and that it be referred to a commissioner of said district court to ascertain and compute the amount of such damages respectively, and report thereon to said district court.

That under the said decree reference was had to John A. Osborn, esquire, a commissioner of said court, to ascertain the amount of such damages.

That, pending such reference, Josiah Johnson, one of the said libellants, died; and that by order of the said district court, entered
100 on the 29th day of February, 1872, the libel in said cause was answered by striking out the name of said Josiah Johnson, and by inserting therein the names of John W. Avery, William A. Avery, and William H. M. Johnson, executors of said Josiah Johnson, deceased; and that afterwards, by an order of the district court, entered on the 14th day of December, 1872, Josiah J. Russell, James Britton, and Robert Hamill were made co-libellants with the other parties named in the libel in said cause.

That by the report of said commissioner, which was filed on the 26th day of November, 1872, it was reported to said court that the damages sustained by the libellants by the collision in the pleadings mentioned, with interest thereon to the date of said report, amounted to the sum of sixteen thousand dollars, to which report the said claimants on the 5th day of December, 1872, filed certain exceptions.

That on the 1st day of February, 1873, the report of said commissioner was confirmed by said district court by the final decree thereof, by which final decree it was adjudged that the said libellants recover of the said schooner Wanata, her tackle, &c., the aforesaid sum of sixteen thousand dollars, with costs, amounting altogether to the sum of sixteen thousand three hundred and five dollars and twenty-seven cents; and the said schooner was condemned therefor, and it was, among other things, further adjudged that, unless an appeal should be taken from said decree within the time limited and prescribed by the rules and practices of said court, the clerk of said court should pay the sum last aforesaid, with interest, to the libellants or their proctors, out of the proceeds of the claimants' stipulation for costs and value when paid into the registry of said court.

And these appellants are advised and insist that the said decree is erroneous, inasmuch as said libellants were not entitled to said damages or any damages, but said claimants were entitled to have said libel dismissed with costs in that behalf.

101 And these appellants, for these and other reasons, appeal from the whole and each and every part of said decree in favor of said libellants to the next circuit court to be held in said district, and upon the said appeal the said libellants intend to have said cause heard anew in the circuit court on the pleadings and proofs in the district court, and other proofs to be introduced in the said *district* [circuit] court, and they pray that the said decree may be reversed or such other decree thereupon be made as to said circuit court shall seem just, and that the appellees may be condemned to pay to these appellants their costs and damages in the premises.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Appellants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

H. Hagner Smith, being duly sworn, doth depose and say, that on the 12th day of February, 1873, he served a copy of the within petition of appeal upon Beebe, Donohue & Cooke, the proctors for the libellants in the within-entitled action, at their office, No. 68 Wall street, in the city of New York, by delivering to and leaving with the person in charge of their said office at the time aforesaid, said copy; that at the time of such service the said proctors were absent from their said office, and further saith not.

H. HAGNER SMITH.

Sworn to before me this 12th day of February, 1873.

PRESCOTT HALL BUTLER,
Notary Public, N. Y. County.

102 Know all men by these presents, that we, George Sparrow and James R. Sparrow, and James R. Sparrow, j'r, are held and firmly bound unto John W. Avery, William A. Avery, and William H. M. Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz, William Smith, George Ellery, Josiah J. Russell, James Britton and Robert Hamill, libellants, in the sum of two thousand dollars, to be paid to the said libellants, their and each of their executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas George Sparrow and David L. Turner, as appellants, have appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the first day of February, 1873, in a suit in which John W. Avery and others are libellants, against the schooner Wanata, her tackle, &c., George Sparrow and David L. Turner, claimants:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against them as
103 such appellants therein if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

GEORGE SPARROW. [SEAL.]
JAMES R. SPARROW. [SEAL.]
JAMES R. SPARROW, J'R. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 17th day of February, 1873, before me.

EDWARD L. OWEN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

James R. Sparrow and James R. Sparrow, junior, being severally duly sworn, depose and say: That they reside in the eastern district

of New York; that is to say, in Greenpoint, in the State of New York; that they are each worth four thousand dollars over and above all his just debts and liabilities.

JAMES R. SPARROW.
JAMES R. SPARROW, J'R.

Sworn to this 17th day of February, A. D. 1873, before me.
EDWARD L. OWEN,
U. S. Commissioner.

This bond approved as to form, and amount and sufficiency of surety. Dated New York, February 17, 1873.
SAM'L BLATCHFORD, *D. J.*

We have no objection to this bond or its form.
BEEBE, DONOHUE & COOKE.

104 SOUTHERN DISTRICT OF NEW YORK, *ss:*

A. W. Evarts, of the city of New York, being duly sworn, doth depose and say, th't he has compared the foregoing printed book with the original records in the case of John W. Avery et al. vs. The schooner Wanata, &c., on file in the office of the clerk of the district court of the southern district of New York, and that it is a true copy of such records.

A. W. EVARTS.

Sworn to before me this 8th day of July, 1873.
[L. S.] PRESCOTT HALL BUTLER,
Notary Public, N. Y. County.

(Endorsed:) Filed July 9th, 1873.

105 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 17th day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Lewis B. Woodruff, circuit judge.

JOHN W. AVERY ET AL., LIB'L'TS & APPELLEES,
vs.
THE SCHOONER WANATA, &C., CL'M'TS & APP'L'TS.

This cause coming on for hearing on appeal:

Mr. Joseph H. Choate is heard in behalf of the claimants & appellants.

Mr. Charles Donohue is heard in behalf of the libellants and appellees.

106 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 18th day of November, in the year of our Lord one thousand eght hundred and seventy-three.

Present, the honorable Lewis B. Woodruff, circuit judge.

JOHN W. AVERY ET AL., LIBELLANTS & APPELLEES,
vs.
THE SCHOONER WANATA, &C., CLAIM'TS & APPELLANTS.

The above case being still on hearing:
Mr. Joseph H. Choate is heard in reply.
Cur adv vult.

107 Circuit court of the United States for the southern district of New York.

JOHN W. AVERY ET AL.
vs.
THE SCHOONER WANATA, HER TACKLE, &C.

WOODRUFF, Circuit J.:

The clear preponderance of the testimony is, that during the approach of the schooner Wanata the light of the pilot-boat was up and burning brightly.

It is, I think, no less clear that the collision was occasioned by the want of a proper lookout in the discharge of his duty on the Wanata.

Upon the question whether the pilot-boat at anchor was bound to exhibit a flare-up light, I concur with the district judge in his conclusion.

I cannot say that the finding of the value of the pilot-boat by the commissioner is not warranted by the evidence, although upon a perusal of all the evidence, it may seem somewhat greater than would have been my own conclusion.

108 The libellants must have a decree for the amount awarded by the court below, with interest and costs of appeal.

(Endorsed:) Circuit court of the U. S. for the southern district of N. Y. John W. Avery et al. vs. The schooner Wanata. Woodruff, circ't j. Filed Dec. 15, 1873.

109 Circuit court of the United States for the southern district of New York.

JOHN W. AVERY ET AL.
v.
THE SCHOONER WANATA.

In settlement of form of decree.

WOODRUFF, Circuit J.:

The claimants ask that the decree herein may award a gross sum to the libellants, and execution therefor, the same to be distributed by the clerk to the several libellants, according to amounts of their several loss or damage caused by the collision for which the schooner is condemned. The libellants, on the other hand, ask that the decree be in substance several decrees; that is to say, that it condemn the schooner for each several amount of loss, and award execution to each libellant, to collect the amount of his separate loss.

The materiality of these conflicting claims is supposed to arise
110 from the apprehension of an appeal by the libellants to the Supreme Court, and a suggestion that if the decree were in the form

last mentioned no appeal would lie from those parts of the decree which award to either or any of the libellants a sum less than two thousand dollars, and that the Supreme Court would not have jurisdiction to reverse any part except that which awards more than two thousand dollars to one of the libellants.

Whether the form proposed by the claimants of decreeing the *the* payment of a gross sum, to be distributed among the libellants, will affect the question of the jurisdiction of the Supreme Court to reverse the whole decree, if found erroneous, is not for this court to decide.

If the apparent injustice of compelling the claimants to pay a part of the loss when the decision of the Supreme Court (as the case may be) declares that the claimants or their schooner have been wrongfully condemned, and ought not to be required to pay anything, can be
111 avoided, without violating any important rule of practice or form, then surely such avoidance would be matter for satisfaction rather than regret. Such apparent injustice was strongly illustrated in the case of Rich vs. Lembert, (12 Hon., 347,) and perhaps still more strikingly in the case of the May Evelyn & Petty vs. Merrill, (3 Benedict, 428; 16 Wallace, 338–348;) in this court April 22, 1874, 12 Blatchford.

I therefore settle the decree in the form which the claimants have requested.

(Endorsed:) Circuit court of the United States for the southern district of New York. Avery et al. vs. The schooner Wanata, &c. Woodruff, circuit J. Filed Dec. 3d, 1874.

112 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms of said court in the city of New York on the 3d day of December, 1874.

Present, Hon. Lewis B. Woodruff, circuit judge.

JOHN W. AVERY, WILLIAM A. AVERY, William H. M. Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz, William Smith, George Ellery, Josiah J. Russell, James Britton, and Robert Hamlin, libellants & appellees,

vs.

THE SCHOONER WANATA, HER TACKLE,
113 apparel, and furniture, George Sparrow, and David L. Turner, claimants and appellants.

The above-entitled cause having come on to be heard on the appeal from the decree of the district court therein, after hearing Joseph H. Choate, of counsel for the claimants and appellants, and Charles Donohue, of counsel for the libellants and appellees, and due deliberation having been had thereon, on motion of James P. Ledwith, proctor for said libellants,

It is ordered, adjudged, and decreed that the decree of the district court in said cause be, and the same is hereby, affirmed, and that the
$16,000. libellants above named recover herein the sum of sixteen

thousand dollars damages, damages sustained by the libellants
114 by reason of the collision in the pleadings mentioned, and the costs of said libellants in the district court, amounting, with in-
323.12. terest, to the sum of three hundred and twenty-three dollars and twelve cents, and also the costs of said libellants in the circuit court, which, including the interest on the amount of damages aforesaid from the time of the decree in the district court to the time of this decree, have been taxed and adjusted at the further sum of one thousand
1,084.35. and eighty-five dollars and thirty-five cents, amounting al-
$17,407.47. together to the sum of seventeen thousand four hundred and seven dollars and forty-seven cents.

And, on like motion, it is further ordered that judgment be, and the same is hereby, entered against George Sparrow, James R. Sparrow, and James R. Sparrow, junior, in favor of the said libellants on
115 their stipulation for value, dated the eleventh day of March, 1869, in the sum of sixteen thousand dollars, and in their stipulation for costs and their stipulations on appeal herein in the further sum of one thousand four hundred and seven dollars and forty-seven cents, amounting altogether to the said sum of seventeen thousand four hundred and seven dollars and forty-seven cents; and that unless an appeal be taken within the time limited by law to stay execution therefor.

And it is further ordered, adjudged, and decreed that the proceeds of said judgment, when paid into court, shall be distributed by the clerk of this court as follows: that is to say, that the sum of fifteen thousand six hundred and three dollars and thirty-eight cents, with interest
116 thereon from the date of this decree, be paid to the libellants William A. Avery, William M. Johnson, and John W. Avery, executors of Josiah Johnson, deceased; that the sum of one hundred and ninety-three dollars and sixty-two cents, with interest thereon from the date of this decree, be paid to this libellant, Hero W. Schultz; that the sum of one hundred and twenty-seven dollars and forty-nine cents, with interest thereon from the date of this decree, be paid to the libellant Charles Miller; that the sum of one hundred and thirty-three dollars and ninety-seven cents, with interest thereon from the date of this decree, be paid to the libellant John Carroll; that the sum of one hundred and seventy-four dollars and sixty-eight cents, with interest thereon from the date of this decree, be paid to the libellant Josiah J. Rus-
117 sell; that the sum of one hundred and sixty-six dollars and sixty eight cents, with interest thereon from the date of this decree, be paid to the libellant Daniel Gillespie; that the sum of ninety-eight dollars and seventeen cents, with interest thereon from the date of this decree, be paid to the libellant Alexander M. Cochran; that the sum of two hundred and forty-four dollars, with interest thereon from the date of this decree, be paid to the libellant Isaac Campbell; that the sum of sixty-seven dollars and five cents, with interest thereon from the date of this decree, be paid to the libellant James Britton; that the sum of seventy-four dollars and eighty-two cents, with interest thereon from the date of this decree, be paid to the libellant Robert Hamill; that
118, 119 the *that the* sum of one hundred and three dollars and nine cents, with interest thereon from the date of this decree, be paid to the libellant James R. Elcock; and that the further sum of four hundred and twenty dollars and fifty-two cents, with interest thereon from the date of this decree, be paid to the libellants in this cause.

L. B. WOODRUFF.

(Endorsed:) United States circuit court southern district of New

York. John W. Avery et al. vs. The schooner Wanata et al. Decree. Evarts, Southmayd & Choate, proctors for claimants. Filed Dec. 3, 1874.

120 Circuit court of the United States for the southern district of New York.

GEORGE SPARROW & DAVID L. TURNER, claimants of the schooner Wanata, her tackle, apparel, & furniture, appellants,
vs.
JOHN W. AVERY, WILLIAM A. AVERY, & William H. M. Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero A. Shultz, William Smith, George Ellery, Josiah J. Russell, James Britton, & Robert Hamill, appellees.

To the honorable the Supreme Court of the United States:

The appeal of the above-named appellants respectfully showeth that on the 8th day of March, 1869, Josiah Johnson, John Carroll,
121 William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero L. Shultz, William Smith, & George Ellery, exhibited their libel in the district court of the United States for the southern district of New York, against the said schooner Wanata, her tackle, apparel, & furniture, praying, among other things, for the reasons set forth in said libel, that the said court would pronounce for the claims in said libel set forth, & would condemn the said schooner & all persons intervening for their interest therein with costs.

That on the 11th day of March, 1869, George Sparrow & David L Turner appeared in said suit, & entered & filed their claim to the said schooner, & a stipulation for sixteen thousand dollars, the value of said schooner, pursuant to the course & practice of said district court.

That on the 21st day of May, 1869, the said claimants of the said schooner filed their answer to the said libel in said district court, praying that the said libel be dismissed, & the said libellants condemned in costs.

That the said cause came on to be tried before the honorable
122 Samuel Blatchford, judge of the said district court, on the 31st day of May & the 1st day of June, 1870, upon the testimony & proofs previously taken therein, & the testimony & proofs then adduced by the respective parties, & the said judge, having advised thereon, afterwards, on the 26th day of October, 1870, made a decree or sentence in said cause, whereby it was sentenced & decreed, among other things, that the libellants recover against the said schooner Wanata, her tackle, &c., the damages by them sustained by reason of the collision, in the pleadings mentioned, & also the costs of said action, & that it be referred to a commissioner of said district court to ascertain & compute the amount of such damages, & report thereon to said district court.

That under the said decree reference was had to John A. Osborn, esquire, a commissioner of said court, to ascertain the amount of such damages.

That pending such reference, Josiah Johnson, one of the said libel-

lants, died, & that by order of the said district court, entered on the 29th day of February, 1872, the libel in said cause was amended by striking out the name of said Josiah Johnson & inserting there-
123 in the names of John W. Avery, William A. Avery, and William H. M. Johnson, executors of said Josiah Johnson, deceased, and that afterwards, by an order of the district court, entered on the 14th day of December, 1872, Josiah J. Russell, James Britton, & Robert Hamill, were made co-libellants with the other parties named in the libel in said cause.

That by the report of said commissioner, which was filed on the 26th day of November, 1872, it was reported to said court that the damages sustained by the libellants by the collision in the pleadings mentioned, with interest thereon to the date of said report, amounted to the sum of sixteen thousand dollars, to which report the said claimants, on the 5th day of December, 1872, filed certain exceptions.

That on the 1st day of February, 1873, the report of said commissioner was confirmed by said district court by the final decree thereof, by which final decree it was adjudged that the said libellants recover of the said schooner Wanata, her tackle, &c., the aforesaid sum of sixteen thousand dollars, with costs, amounting altogether to the sum of sixteen
124 thousand three hundred & five dollars & twenty-seven cents, & the said schooner was condemned therefor, & it was, among other things, further adjudged that unless an appeal should be taken from said decree within the time limited & prescribed by the rules & practice of said court, the clerk of said court should pay the sum last aforesaid, with interest to the libellants or their proctors, out of the proceeds of the claimants' stipulation for costs & value when paid into the registry of said court.

And that after such final decree in said district court these appellants duly appealed therefrom to the circuit court of the United States for the southern district of New York, & the said cause was removed thereby into the said circuit court & there tried anew, & such proceedings were had in the said circuit court that afterwards, on the 3rd day of December, 1874, the said circuit court made a final decree in the said cause whereby it was decreed that the said decree of the district court be in all things affirmed with costs, that the appellees recover the said sum of sixteen thousand dollars, with interest & costs, amount-
125 ing altogether to the sum of seventeen thousand four hundred & seven dollars & forty-seven cents, & that unless an appeal be taken within the time limited by law to stay execution, the said appellees have execution therefor, & that the stipulators cause their stipulations to be fulfilled; which said decree of the said circuit court is, as these appellants are advised, erroneous & ought to be reversed.

Wherefore, these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, & respectfully pray that the decree of the said circuit court & the libel, answer, pleadings, depositions, evidence, & proceedings in the said cause may be sent to the Supreme Court of the United States, without delay, & that the said Supreme Court will proceed to hear the said cause anew, & that the said decree of the circuit court, & every part thereof, may be reversed & a decree made dismissing said libel with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, December 7, 1874.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Appellants.

126 (Endorsed:) Circuit court of the United States, southern district of New York. George Sparrow et al., claimants of schooner Wanata, her tackle, apparel, &c., appellants, vs. John W. Avery et al., appellees. Appeal to Supreme Court. Evarts, Southmayd & Choate, proctors for appellants. Filed Dec. 10, 1874.

127 Circuit court of the United States, southern district of New York.

GEORGE SPARROW AND DAVID L. TURNER, claimants of the schooner Wanata, her tackle, apparel, and furniture, appellants,
vs.
JOHN W. AVERY, WILLIAM A. AVERY, AND William H. M. Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero A. Shultz, William Smith, George Ellery, Josiah J. Russell, James Britton, and Robert Hamill, appellees.

To the honorable the Supreme Court of the United States:

The appeal of the above-named appellants respectfully showeth that on the 8th day of March, 1869, Josiah Johnson, John Carroll,
128 William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah R. Johnson, Alexander Cochran, Charles Miller, Hero L. Shultz, William Smith, and George Ellery, exhibited their libel in the district court of the United States for the southern district of New York against the said schooner Wanata, her tackle, apparel, and furniture, praying, among other things, for the reasons set forth in said libel, that said court would pronounce for the claims in said libel set forth, and would condemn the said schooner and all persons intervening for their interest therein with costs.

That on the 11th day of March, 1869, George Sparrow and David L. Turner appeared in said suit and entered and filed their claim to the said schooner, and a stipulation for the costs of said suit, and a stipulation for sixteen thousand dollars, the value of said schooner, pursuant to the course and practice of said district court.

That on the 21st day of May, 1869, the said claimants of the said schooner filed their answer to the said libel in said district court, praying that the said libel be dismissed and the said libellants condemned in costs. That the said cause came on to be tried before the honorable Samuel Blatchford, judge of the said district court, on the 31st
129 day of May and the 1st day of June, 1870, upon the testimony and proofs previously taken therein and the testimony and proofs then adduced by the respective parties, and the said judge, having advised thereon, afterwards, on the 26th day of October, 1870, made a decree or sentence in said cause, whereby it was sentenced and decreed, among other things, that the libellants recover against the said schooner Wanata, her tackle, &c., the damages by them sustained by reason of the collision in the pleadings mentioned, and also the costs of said action, and that it be referred to a commissioner of said district court to ascertain and compute the amount of such damages and report thereon to said district court. That under the said decree reference

was had to John A. Osborn, esquire, a commissioner of said court, to ascertain the amount of such damages.

That pending such reference, Josiah Johnson, one of the said libellants, died, and that by order of the said district court, entered on the 29th day of February, 1872, the libel in said cause was amended by striking out the name of said Josiah Johnson, and inserting therein the names of John W. Avery, William A. Avery, and William H. M.
130 Johnson, executors of said Josiah Johnson, deceased; and that afterwards, by an order of the district court, entered on the 14th day of December, 1872, Josiah J. Russell, James Britton, and Robert Hamill were made co-libellants with the other parties named in the libel in said cause.

That by the report of said commissioner, which was filed on the 26th day of November, 1872, it was reported to said court that the damages sustained by the libellants by the collision in the pleadings mentioned, with interest thereon to the date of said report, amounted to the sum of sixteen thousand dollars; to which report the said claimants, on the 5th day of December, 1872, filed certain exceptions.

That on the 1st day of February, 1873, the report of said commissioner was confirmed by said district court by the final decree thereof, by which final decree it was adjudged that the said libellants recover of the said schooner Wanata, her tackle, &c., the aforesaid sum of sixteen thousand dollars, with costs, amounting altogether to the sum of sixteen thousand three hundred and five dollars and twenty-seven cents; and the said schooner was condemned therefor; and it was,
131 among other things, further adjudged that unless an appeal should be taken from said decree within the time limited and prescribed by the rules and practice of said court, the clerk of said court should pay the sum last aforesaid, with interest, to the libellants or their proctors, out of the proceeds of the claimants' stipulation for costs and value, when paid into the registry of said court.

And that after such final decree in said district court, these appellants duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby into the said circuit court, and there tried anew; and such proceedings were had in the said circuit court that afterwards, on the 3rd day of December, 1874, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things affirmed, with costs; that the appellees recover the said sum of sixteen thousand dollars, with interest and costs, amounting altogether to the sum of seventeen thousand four hundred and seven dollars and forty-seven cents; and that unless an ap-
132 peal be taken within the time limited by law to stay execution, the said appelle's have execution therefor, and that the stipulators cause their stipulations to be fulfilled; which said decree of the said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the decree of the said circuit court and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said libel with

costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, December 7, 1874.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Appellants.

133 (Endorsed:) United States circuit court, southern district of New York. George Sparrow et al., claimants of schooner Wanata, her tackle, apparel, &c., appellants, vs. John W. Avery et al., appellees. Appeal to Supreme Court. Evarts, Southmayd & Choate, proctors for appellants.

Service of a copy of an appeal of which within is a copy is hereby admitted.

New York, December, 10th, 1874.

JA'S P. LEDWITH,
Proctor for Appe.

Filed M'ch 27, 1875.

Served person in charge of office Dec. 10th, 1874.

W. R. W.

134 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

GEORGE SPARROW AND DAVID L. TURNER, claimants of the schooner Wanata, her tackle, apparel, and furniture, appellants,
against
JOHN W. AVERY, WILLIAM A. AVERY, William H. M. Johnson, executors of Joshua Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah Johnson, Alexander Cochran, Charles Miller, Hero A. Schultz, William Smith, George Ellery, Josiah J. Russell, James Britton, and Robert Hamill, appellees.

Know by all men by these presents that we, George Sparrow and David L. Turner, the above-named appellants, as principals, and James R. Sparrow, of the city of Brooklyn, in the State of New York, and James R. Sparrow, junior, of the last-mentioned city, are held and firmly bound unto the above-named appellees as sureties in the sum of thirty-six thousand dollars, to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents sealed with our seals, and dated the seventh day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named appellants have prosecuted an appeal to the Court of the United States, to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the

above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEORGE SPARROW.
DAVID L. TURNER.
JAMES R. SPARROW.
JAMES R. SPARROW, J'R.

Sealed and delivered, and taken and acknowledged this 7th day of December, 1874, before me as to David L. Turner.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

And this 9th day of December, by George Sparrow, James R. Sparrow, & James R. Sparrow, j'r.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

135 UNITED STATES OF AMERICA,
Southern District of New York, ss:

James R. Sparrow and James R. Sparrow, junior, being duly sworn, depose and say, and each for himself says, that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

JAMES R. SPARROW.
JAMES R. SPARROW, J'R.

Sworn to this ninth day of December, A. D. 1874, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

The foregoing bond is approved.
December 10th, 1874.

SAM'L BLATCHFORD.

(Indorsed:) Vol. . Page . U. S. circuit court. George Sparrow et al., claimants of schooner Wanata, her tackle, &c., vs. John W. Avery et al. Bond for costs on appeal to Supreme Court. Evarts, Southmayd & Choate, appellants' proctors. Filed this 11th day of Dec., 1874.

136 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit: To John W. Avery, William A. Avery, William H. M. Johnson, executors of Josiah Johnson, deceased; John Carroll, William Qualey, Isaac Campbell, James R. Elcock, William Carroll, D. Gillespie, Josiah Johnson, Alexander Cochran, Charles Miller, Hero A. Shultz, William Smith, George Ellery, Josiah J. Russell, James Britton, & Robert Hamill, appellees.

Whereas George Sparrow & David L. Turner, claimants of the schooner Wanata, her tackle, apparel, & furniture, have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said appellees, against the said schooner Wanata, her tackle, apparel, & furniture, & have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do & receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the south-
137 ern district of New York, in the second circuit, the 10th day of December, in the year of our Lord one thousand eight hundred & seventy-four, & of the Independence of the United States the ninety-ninth.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. George Sparrow et al., claimants of the schooner Wanata, her tackle, apparel, &c., appellants, vs. John W. Avery et al., appellees.

Citation.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Appellants:

Service of a copy of within citation is hereby admitted this 11th day of December, 1874.

JAM. P. LEDRITCH,
Proctor for Appellees.

Filed M'ch 27, 1875.

138 UNITED STATES OF AMERICA:
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred & thirty-seven inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John W. Avery et al., libellants & appellees, against schooner Wanata, her tackle, &c., George Sparrow et al., claimants and appellants, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of June, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsement on cover:) No. 86. George Sparrow and David L. Turner, claimants of the schooner Wanata, her tackle, &c., appellants, vs. John W. Avery, W'm A. Avery, W'm H. M. Johnson, ex'rs of Josiah Johnson, dec'd, John Carroll, et al. S. New York C. C. U. S. Filed 17th July, 1875.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

In the Supreme Court

OF THE UNITED STATES.

GEORGE SPARROW ET AL., Claimants of the Schooner *Wanata*, her Tackle, etc.
Appellants,

against

JOHN W. AVERY AND OTHERS, Executors of Josiah Johnson, deceased, John Carroll, et al.,
Libellants.

Brief for Claimants, Appellants.

Statement.

This is an appeal from the final decree of the Circuit Court of the United States for the Southern District of New York, affirming the decree of the District Court, and condemning the schooner *Wanata*, her tackle, etc., in a cause of collision.

The libel was filed against the schooner *Wanata* to recover for the damages caused to the libellants by the sinking and total loss of the pilot boat *Josiah Johnson*, and of certain clothing and other property on board of her, through a collision which occurred between the two vessels about nine o'clock P. M., on the sixth day of March, 1869.

The libellant, Johnson, since deceased, was the owner of the pilot boat, and the other libellants were the owners of such clothing and other property.

At the time of the collision the pilot boat was at anchor off the coast of New Jersey, on the Atlantic Ocean, about half a mile from the shore in four fathoms of water, and about fifteen or twenty miles north of Barnegat, and between that point and Long Branch.

The *Wanata* had sailed from New York for Charleston, S. C., the same day at three P. M. She passed the Hook about five o'clock. At that time a storm sprang up, accompanied with snow squalls and a very violent wind from the northwest, and this continued to increase to the time of the collision, accompanied with intense cold—the coldest night of that year—so as to render the handling of the vessel in a measure impracticable. The pilot boat had met with similar difficulty, having been compelled to anchor at or before six o'clock, her foresail having been split by the wind. After passing the Hook the schooner first double-reefed her mainsail, then took in her flying jib, and double-reefed the foresail. At dark she attempted to set her lights, which, as fast as set, were blown out by the violence of the wind. Canvas was put around the lamps to protect them, but they were still blown out, and repeated attempts were made to keep them lighted, but without avail. Finding that the lights could not be kept burning, the captain determined to go under Barnegat and anchor, steering for that purpose about south-southwest, and continued on that course till the collision. The place where the pilot boat anchored, and the collision occurred was in the

highway for vessels bound in and out of New York and up and down the coast. The pilot boat swung at her anchor, with the wind heading about northwest; the schooner struck her on the starboard side, between the mainmast and foremast, and she sank in a few minutes.

The libel charged that the *Wanata* was at fault in not keeping a proper lookout, in not in time taking steps to avoid the collision, and in sailing at too great a rate of speed.

The answer denied all these allegations of fault on the part of the schooner, and charged that the collision was caused by the fault of the pilot boat. *First*, That she anchored in an unsafe and improper place in the track of vessels sailing up and down the coast, thus exposing herself to the very disaster which happened to her. *Secondly, That, at the time of the collision, the pilot boat was without a light*, save a lantern standing upon her deck, which, obscured by her bulwarks or other surrounding objects, could not be seen from a distance, and answered no purpose of warning the persons navigating the schooner of her proximity; and *Thirdly, That she had no lookout — no anchor watch.* And these are the questions involved.

The court below condemned the *Wanata* as solely at fault, and the appellants allege the decree below to be erroneous in the following particulars:

1. In holding that the pilot boat's place of anchorage was a proper one, or one that did not necessarily expose her to risk of collision.

2. In holding that as matter of fact the pilot boat showed the light required by article seven, concerning lights.

3. In holding that as matter of law she, being at anchor, was not bound to show, the light required of all pilot vessels by article 8, namely, a

white light at the mast head and a flare-up light every fifteen minutes.

4. In holding that the want of a lookout on the pilot boat did not contribute to the collision; and

5. In holding that the schooner had no proper lookout, and that the collision was in any manner or wholly attributable to such want of lookout.

6. In holding that the collision, or any default on the part of the schooner which may have caused or contributed to the same, was not due to inevitable accident.

7. In finding the schooner alone in fault, and imposing the whole damage upon her.

8. In awarding costs, in the District Court, in excess of the stipulation for costs there filed, which was for $250 only.

And the Circuit Court in decreeing interest, taxed as costs, in addition to the damages decreed in the District Court which were the full amount of the stipulation for the appraised value of the *Wanota*. The appellants claim that the Circuit Court could not properly decree damages in any form beyond the amount of the original stipulation, which was $16,000, and could not, as against the claimants or the stipulators, increase that sum, even by the device of taxing interest as costs.

The appellants also allege an error in the proceedings before the commissioner for the assessment of damages in respect to the valuation of the lost pilot-boat.

The libellants had proved her condition at the time of sailing, and estimates by witnesses of what she was

worth at the time. But it apppeared that pilot boats, being of peculiar model and construction, and built for the service, are very rarely subjects of sale so as to establish a market value, and that there were, practically, no sales between 1866 and 1869. She was built in 1863. The claimants had given evidence as to the degree of depreciation in the value of a pilot boat from use year by year, and also of the decline in the market value of vessels generally from the spring of 1863 to the time of the collision.

In this position of the proofs the claimants offered to prove by the builders the actual cost of the pilot boat, and that this was less than the amount claimed by the libellants as her value at the time of her loss, and offered to show this cost as an independent fact, and also in connection with the testimony previously introduced concerning the course of the market during the intervals between her construction and loss, and also concerning the depreciation of this vessel during that period. Upon the libellants' objection and under exception this evidence was excluded, which the appellants allege to have been error.

POINTS.

First.—As to the schooner's lights. The absence of these is fully explained and excused. The schooner sailed from New York in the afternoon, properly equipped in this respect. Duplicates of her lights were produced in court, and shown to conform to the requirements of the statute, and to be the lights customary with small vessels of the size of the *Wanata*. They have been in use upon her ever since.

From sundown, after passing Sandy Hook, repeated attempts were made on board to set them lighted in

their customary places, but the extraordinary violence of the winds prevented. The first time, they were blown out as soon as brought from the cabin; the second time, before they reached the boxes. An attempt was then made to protect them in part from the wind by wrapping canvass about the bottom, but still one of them blew out before fairly placed in the box, and the other burned only for a short time. The wind continued steadily to increase until the collision.

Certainly, then, there was no negligence or fault on the part of the schooner in not showing lights which the tempest rendered it impossible to keep burning.

Evid. of Capt. Hawkins, fol. 22.
Evid. of Weeks, fol. 26.

It must follow, therefore, that so far as the absence of lights on the schooner may have contributed to the collision, it arose not from fault on her part, but from aceident, recognized in the law as inevitable. Dr. Lushington defines an inevitable accident to be "that which the party charged with the offense could not possibly prevent by the exercise of *ordinary* care, caution, and maritime skill."

The "Virgil," 2 *W. Rob.*, 201.
1 *Parsons' Marit. Law*, 187.

As not only in respect to the lights but also in respect to every other fault alleged by the libellants, or found by the court below against the schooner, we claim to account for, explain and excuse the same by the extraordinary fury of the tempest, and the intense severity of the weather and the cold, it may be proper here to recall to the attention of the court some of the adjudged cases on the subject of "inevitable accident" as contributing to collisions, and to point out how far the courts have gone in exonerating vessels from fault when exposed to extraordinary storms and perils of the sea, for conduct which under other circumstances would have led to their condemnation.

In the case of the *Thornley* (7 *Jurist*, 659), the *Thornley* came into collision with the *Mentor* which was lying at anchor near the Nore sand. The *Thornley* had touched on the sand and was forging over it and for this reason did not let go her anchor when hailed to do so. But on account of the danger in which she herself was, that was held not to have been negligence, and the collision was held to have been an inevitable accident.

In the *Ebenezer* (7 *Jurist*, 117), a collision on a dark night was held to have been an inevitable accident, although it was urged that the colliding vessel was carrying too great a press of sail which she said was to prevent other vessels running the same way from running into her.

In the *William Lindsay* (29 *Law Times, Rep. N. S.*, 355), the *William Lindsay* had fastened to a buoy at which other vessels had previously moored. The buoy gave way and the vessel began to drift. The anchor was ready to let go, but in letting it go the chain became jammed in the windlass so that the anchor did not touch the ground and the vessel drifted on another vessel at her moorings. The collision was held to have been an inevitable accident.

In the *Aimo* and the *Amelia* (29 *Law Times, Rep. N. S.*, 118), the *Amelia* was on the port tack and the *Aimo* was close hauled on the starboard tack. It was the duty of the *Amelia* to keep out of the way; she had, however, been damaged by a previous collision and had become somewhat disabled. *She kept her course*, her disabled condition making it very difficult for her to pay off so as to pass to leeward of the *Aimo*. When the collision became imminent she starboarded her helm.

The Privy Council held that no want of *ordinary care and skill* was shown against the *Amelia* and held her not liable.

In the case of the *Cuba* (2 *Asp., Mar. Law, Cas.* 344), the court says: "To constitute an inevit-

able accident it was necessary that the occurrence have taken place in such a manner as not to have been capable of being prevented by ordinary skill and or dinary diligence. We are not to expect extraordinary skill or extraordinary diligence; but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."

"*The Grace Girder*," 7 *Wallace*, 203.

See also "*The Calcutta*," 3 *Asp.*, 336, *Lowndes on Collisions, p.* 98.

In the case of "*The Morning Light*," Mr. Justice Clifford said: "Where the loss is occasioned by a storm or any other *vis major*, the rule, as established in this court, is that each party must bear his own loss, and the same rule prevails in most other jurisdictions."

"*The Morning Light*," 2 *Wallace*, 550, and cases there cited.

Second.—As to the allegation of undue speed on the part of the schooner, charged by the libel. There is no evidence as to the rate at which she was going at or near the time of the collision, and the suggestion is based entirely upon the distance she made between Sandy Hook and the place of the collision in the supposed time of from three to four hours. But, apart from the consideration that the exact place of the collision is not fixed with any degree of certainty, so that the distance traveled is wholly uncertain, the facts proved establish due diligence on the part of the schooner to shorten sail and diminish her speed. The schooner was at no time absolutely out of control, though, from the extraordinary severity of the weather it required extraordinary exertions on the part of her crew to handle her, and their labors to that end tasked to the utmost their strength and endurance, benumbed

and partly disabled, as they were, by the cold and exposure. Their hands were frost-bitten, and the water, breaking over the vessel, encased her in ice. All hands remained on deck from supper-time—six o'clock—till the collision—9:15—and the character of the night is shown by the fact that all their exertions were only sufficient to double reef the mainsail and the foresail, and to take in the outer jib, which occupied all the time until twenty minutes before the collision. The schooner sailed from New York early in the afternoon, having all sails set and a fair wind, bound for Charleston, S. C. Under such circumstances, all sail was the proper amount of sail to carry. About sundown, when just outside of Sandy Hook, the wind began to blow fiercely from the north west. The night was the coldest of the winter of 1869–70.

Evid. of Cochrane 14; *Qualey*, 13; *Wm. Carroll*, 14: *John Carroll*, 12; *Gillespie*, 9; *Sparrow*, 30; *Hawkins*, 23; *Weeks*, 26.

The first sail taken in was the mainsail. The ice forming over everything, the intense cold and the violent winds rendered this a very difficult operation, occupying much time. At the same time the attempts with the lights were being made. Next, the outer jib was taken in with the same difficulty and expense of time; and then, without any interval or delay, they went to work upon the foresail. Getting the foresail double reefed occupied an hour; and, when this was completed, it was already fifteen or twenty minutes before the collision.

It is evident, therefore, that every effort was made by the schooner to shorten sail, and that she was kept well under control. If she was making undue speed at any time, it was when the tempest first overtook her, while she was under full sail—certainly not in the neighborhood of the time of the collision, when she

was reduced to double reefed main and fore sail, stay sail and jib.

To accomplish this the efforts and endurance of her officers and crew were extraordinary; they were badly frostbitten, and suffered greatly from the storm. Their duty under the circumstances was to seek the most accessible anchorage, and the speed they were making after taking in sail must have been very moderate. There is nothing from which the court can determine what it was, except from the sail she carried, the wind, which was from the northwest, or a point westward of that, and from the course of the schooner, making to the south or a little west of that.

Thus her speed, which in the libel is directly charged and in the opinion of the district judge is considered in connection with her want of lights, and of lookout, cannot be charged as a fault. Such as it was it resulted from the fierceness of the storm; after all, that those on board could do to counteract it, had been done.

Third.—It is true that the claimants have failed to show a lookout, technically so called, in the bow of the schooner at and for five minutes before the moment of collision; but we claim that they did their best even in this respect in the distressed situation in which they were placed, and that, if proper lights had been exhibited on the pilot boat during the five minutes in question, they would have seen them; so that it was not the want of a lookout on the schooner, but of lights on the pilot boat, which can justly be said to have caused the collision. And during the very short interval, in which we fail to prove a lookout forward, we excuse it by the necessity of all hands being employed in the urgent duty of getting ready to anchor. The schooner sailed on her voyage with

a full complement of men, and the emergency in which the tempest placed them is to be considered. She was a schooner of 300 tons, and her complement of men, an ordinary one for a vessel of that size, on that voyage, consisted of two mates and four men, besides the captain and steward, and all, as the time of the collision approached, were in a measure disabled by long exposure to the cold. While such a storm was raging, catching the vessel under full sail, all hands were constantly needed for the work in hand. The great business was to take in sail, not neglecting an adequate lookout, and it is evident from all the evidence on the part of the schooner that this was maintained. It is clear that, down to five minutes before the collision, the mate forward and the master at the wheel were both on the lookout. It is proved that from the wheel a man there standing could see forward, so that proper lights on the pilot boat could not have escaped the eye of the mate, who during the last five minutes had the helm (p. 30). To be sure the mate directed the job of reefing the main sail, but he did not put his hand to it, and that was finished some two hours before the collision, so that the time makes it immaterial (p. 27); but from the time they finished reefing the mainsail to the time when he relieved the captain at the wheel, say five minutes before the collision, the mate was forward, and swears positively that he was there on the lookout (p. 25); all the work done was forward, taking in outer jib, reefing the foresail, and overhauling the chain. His giving directions for that work did not interfere in the slightest with his keeping a lookout. From the time when he relieved the captain at the wheel, he kept a lookout till the collision. It was not the want of a lookout on the schooner that in any way led to the collision, but the position of the pilot boat's light, when discovered, invisible to the approaching vessel, until she was right over it; for the mate at the wheel, being on the lookout, did see the light as soon as it became visible, as

well as the captain from the house (p. 26). It appears from the evidence of Sparrow, who was in the cabin, that the mate at the wheel was where he could see forward, and that he saw the light too late to be sure to avoid the collision, but still a moment the first; for Sparrow, after the captain had left the cabin, heard the mate say to the captain, "light ahead." Captain asked "where?" Mate said "right ahead." Captain ordered "helm hard up" (p. 30).

The captain, five minutes before the collision, having been three hours at the wheel, and being badly frost bitten, went into the cabin to look at a chart leaving the mate at the wheel (p. 30). He was gone for a minute or two and returning got upon the house and was there on the lookout when the mate reported the light of the pilot boat (p. 22).

For two hours at least before the collision and down to the last minute, the second mate and the four men were forward at work, and under order, as they worked, to keep a lookout (*Weeks*, 25). They did see forward, for they all saw Barnegat light, but they saw no other light until just at the moment of the collision (*Brewster*, *p.* 28; *Worth*, *p.* 29). Two of them we have been unable to find and produce, and labored under the disadvantage of trying the case without them (*Sparrow*, *p.* 30), but it is reasonably certain that, if the pilot boat's light had been, where the law required, or at any reasonable height, anywhere but on or close to the deck, it must and would have been seen from the schooner.

The final order of the master, having already shortened sail sufficiently, to overhaul the chain so as to get ready to anchor, was, under the circumstances, proper and necessary, and, in the emergency of the extraordinary weather, it required all the hands that were put to it.

It must be remembered, that in the stress that was upon them as they approached the anchorage ground, overhauling the chain immediately and promptly was

an imperative necessity for the safety of the vessel and their lives. Frost-bitten as they were, it took more men, and doubtless absorbed their attention more closely than in ordinary weather it would have done. In ordinary weather one man might have been spared, but not as they were and as the night was.

Must not cases sometimes arise in such extraordinary weather where, for the time being, all hands on board are necessarily engaged in work necessary to save the ship herself? Does not the evidence in this case show that the *Wanata* was in that predicament for the five minutes before the collision? And does not this predicament fairly excuse the want, during that brief period, of other lookout than the mate at the wheel and the captain on the house? We confidently demand affirmative answers to these questions in view of the cases already cited on the subject of "inevitable accident."

Fourth.—But whatever view may be taken by the court of the faults against the schooner, it is clear upon the evidence that the pilot boat was in fault in having no anchor watch, and no light where the law required, or visible at all to an approaching vessel, so that the decree below, imposing the whole damage upon the schooner, was clearly erroneous.

As to her light, if the violence of the winds had prevented the pilot boat, lying somewhat under the shelter of the shore as she did, from keeping her light burning, as was the case with the schooner while under way, then the collision would be the result of inevitable accident, and the schooner would not be liable, the loss being borne by the party on whom it fell.

This leads to the inquiry, what is required by law and usage of a pilot boat lying at anchor, in the matter of lights, and we claim that she wholly failed to

show the light required by the act of Congress, or, if the act of Congress is inapplicable, then by what is reasonable and proper for any vessel under the circumstances in which the pilot boat was placed.

The act of Congress imperatively required the pilot boat to keep a bright light at *the masthead*, visible all around the horizon, and also to show a flare-up light at least once in every fifteen minutes.

The only clause of the act of Congress referring in any manner to pilot vessels is the eighth article, as follows:

13 *Stat.* 59.

ART. VIII.—"Sailing pilot vessels shall not carry "the lights required for other sailing vessels, but shall "carry a white light at the masthead, visible all "around the horizon, and shall exhibit a flare-up light "every fifteen minutes."

The direction is peremptory, and applies to pilot boats as well when at anchor as when under way. For other sailing vessels the act prescribes certain lights when under way, and certain different lights when at anchor. But in the case of pilot vessels there is no distinction. They are to show the same lights under all circumstances, whether in motion or at anchor.

"*Sailing*," in this article, as in every other clause of the same statute, is an adjective of description, indicating the kind of vessel, and cannot be tortured into meaning "in the act of sailing" or "while sailing." In the other parts of the statute it is uniformly used to distinguish sailing vessels from steam vessels, and in this clause, as the context shows, to distinguish "sailing pilot vessels" from "other sailing vessels," or steam pilot vessels.

The act nowhere uses the word "sailing" to indicate a vessel under way. On the contrary, when that

idea is intended, the phrases used are "vessels under way" and "vessels not under way."

And this, we suppose, ends the case, as there is no pretence that this pilot boat had any light in the masthead, or exhibited a flare-up light at all; and it is obvious that had she done so she would have been visible to and discovered by the *Wanata* at a great distance, and that the collision would have been prevented.

We submit with due deference that the verbal criticism of the "Rules concerning Lights," in the opinion of the learned District Judge on this point, is delusive, and fails to give effect to the plain letter and meaning of the statute.

Both the Title of Article 8, "Lights for Pilot Vessels," and its text, show that it was intended to prescribe an exclusive and peculiar rule for pilot boats, and which was to govern them under all circumstances, whether under way or at anchor.

The learned judge concedes that "sailing" in this article means rigged with sails, to distinguish them from steam pilot vessels, and does not mean "underway" to distinguish them from pilot boots at anchor.

(*a.*) The distinction which he seeks to draw between "*carry*" and "*exhibit*" is not borne out by all parts of the statute, for "Article 2," which is intended to embrace by reference all the succeeding articles, uses the word "*carry*" indiscriminately to cover all the lights mentioned in them, whether prescribed in succeeding sections as to be "carried," or "exhibited," or "kept."

(*b.*) Reference to Articles 6, 7 and 9 proves that the word "exhibit" is quite as appropriate to vessels at anchor as to vessels under way, and that, when Congress intended to limit the required "exhibition" to the predicament of a vessel at anchor,

they expressly say so, leaving nothing for implication or conjecture.

(*c.*) A pilot boat is not a "ship," whether a "steamship or sailing ship," within the meaning of Article 7; and it would be just as reasonable to force fishing vessels and open boats from Article 9 into Article 7, as to dispose of pilot boats at anchor in that way.

(*d.*) The reasons given by the learned District Judge for the exhibition by pilot boats, when under way, of the flare-up light, viz., to indicate their character and to guard against collision with them, are equally applicable to the same craft when at anchor.

Fifth.—But, assuming that the pilot boat was bound, while at anchor, to show only the light required by Article 7, *she did not do that.*

(*a.*) Upon the undisputed testimony of her own witnesses, the light, that she did have, was so obscured by wrappings of canvas, to protect it from the violence of the winds, as not to be visible "all around the horizon," or at any distance away from her.

The light, which she appears to have been provided with, was a ten-inch globe lantern. (Evidence of Gillespie, p. 8.)

This is claimed to have been set at six o'clock. But at half past seven it was blown out by the winds. The pilot boat experienced the same mischief from the gale as the schooner did, and she resorted to the same device to keep her light from going out.

Gillespie, who relighted the lamp, testifies, p. 9: "I relit it again, and took a piece of canvas and put "it around the bottom of it, and made the canvas fast "by tying it round the bottom of the lamp; I did this "to stop it from blowing away; there was too much "air into it; this piece of canvas covered the entire "bottom of the lamp, all but a little; * * * "the piece of canvas which I put over the lamp was "about nine by eight inches, and I tied it with spun "yarn on the lamp, the whole width of the canvas, "leaving a little space for air."

Thomas, p. 17: "I know the light was taken down "for the purpose of fixing it, as it was quite or nearly "out; it might have been blown out; in fixing it a "piece of canvas was put over the top of the lamp to "prevent it from blowing out; I don't know whether "the canvas was put on the top or the bottom."

This wrapping of the canvas around the lantern must, of course, have effectually concealed its rays from all approaching vessels; and the fact is explanatory of what is otherwise inexplicable in the evidence.

There is much dispute as to where this light, thus obscured, was at the time of the collision, some of the witnesses placing it high up in the rigging, and others on the deck of the pilot boat.

But the witnesses on the pilot boat all give as a reason for knowing that it was still burning,—some on the deck and some in the rigging,—because, as they rushed out from the forecastle, it lighted them to go upon the schooner. While the witnesses on the schooner, denying that the light showed at all until they were close upon it, describe it then as a light bulging out from the surface of the water, or reflected from the deck. Now, the fact of canvas being wrapped around it may account for all these varying views of witnesses in whichever position the light may have been.

If this partial hiding of the light of the pilot boat was unnecessary, it was clearly a fault on her part directly contributing to the collision. If it was necessary because of the fury of the wind, then so far as it was a contributing cause, it was fairly within the category of inevitable accidents.

(*b.*) But again, the appellants claim with confidence upon the proofs that *the the only light on the pilot boat, when the Wanata approached her, was a light standing on her quarter-deck, or in close proximity to the deck.*

The answer of the claimants, p. 6, the evidence of *Hawkins*, p. 23, of *Weeks*, the mate, p. 26, and of *Brewster*, one of the men of the *Wanata*, p. 28, described the pilot boat's light as not showing at all until just as the schooner came upon her, and then suddenly bulging out, as from the surface of the water, or as if brought up suddenly from below, and Captain *Hawkins*, who ran immediately forward, saw it standing on the deck of the pilot boat.

Is not this fully confirmed by the libellant's testimony? The evidence of the claimants is the only testimony in the case on the direct matter of fact. For when the collision occurred, while all the crew of the schooner were on deck, bravely devoted to their duty, *every man upon the pilot boat was below, and most of them abed and asleep;* but a careful examination of their testimony, as relating to the pilot boat's light, both before and immediately after the collision, confirms the evidence and theory of the claimant's.

This requires a very careful analysis of the libellant's testimony on the part of the court, and we subjoin the material portion of the depositions offered by the libellants, from which it will appear that our evidence, that it was on deck at the time of the collision, is sustained by five of the libellants' witnesses, who saw it there at the point of time nearest to the collision, that they saw it at all, viz., the moment afterwards—that is by *Cochrane*, *Qualey*, *Wm. Carroll*, *Thomas* and *Schultz.*

COCHRANE, *p.* 13. Went last below at 6; asleep at time of collision; hatch of forecastle eight or nine feet forward of mainmast.

Light—bright; a globe lantern had been set before I went below in *main peak halyards.*

Waked by the collision; came up; light was *then in main peak halyards;* it was burning bright.

I do not know whether the light, that I have spoken of, was in the same place when I came on deck, after the collision, that it was when I went below; nothing was between me and the light when I got on the schooner; *as I came out of the pilot boat hatch the light was right in front of me; I could not tell whether it was above or below the level of my head as I got out of the hatch.*

QUALEY, *p.* 12.—Went below after coming to anchor about sundown; before that a light had been put up *in the main peak halyards;* came on deck one and a-half hours later; *light was then burning bright in main-peak halyards;* did not come again till after collision; then when I went on deck the light was still burning, *it stood on deck;* where the peak halyards having slacked it stood; the peak halyards had slacked I *suppose by the carrying away of the peak halyards;* I passed the light as I went along the deck.

WILLIAM CARROLL, *p.* 14.—Saw light put up about 6, but was not on deck afterwards; in *main yeak halyards, after the collision the light was then standing on deck on its bottom, attached to main peak halyard. I believe* it had been lowered by the mainmast being unstepped or broken; it slacked the halyards and lowered the light to the deck.

The light that I speak of *was sittiny on our deck;* as I got out of the companion way *it was on the quarter deck,* about six or eight feet abaft of the mainmast on starboard side of pilot boat.

Q. How do you know that the lantern was attached to the main peak halyards while standing on deck, as you have said?

A. I saw some loose rope about it, and some slack rope from the main gaff, and I inferred from that that it was attached to the main peak halyards.

JOHN CARROLL, *p.* 11.—Last went below at 6½; then a light *had been set in main peak halyards.*

I noticed the light again, when I came on deck, in the main peak halyards; after I came on deck as I passed over main boom, I saw the light attached to the peak halyard.

Had been below most of the afternoon.

THOMAS, *p.* 17. Was on deck inside of ten minutes before collision; the light was up burning brighter than usual; *in the main peak halyards where they are usually hung.*

At first it did not burn good; we had it taken down and trimmed, because it was a squally night; went into cabin; saw the light burning through skylight; was asleep at time of collision, when I got on deck I saw the light (don't say where).

The light was pretty well out at one time, but that was the first part of the evening; I know the light was taken down for the purpose of fixing it as it was quite or nearly out; it might have been blown out; canvas put over the top or bottom to protect it.

The light that I have spoken of *was lower* when I came on deck after the collision than it was when I saw it before; *it appeared to be close down near the deck on the starboard side of pilot boat*, but no nearer the mainmast than it was before; it had not slipped down the halyards.

Q. How did you know?

A. Because I do; the mainmast had a cant aft, and that had brought the lantern down, *near the deck.*

Redirect:

The mainmast had, it appeared to me, been unstepped below and canted aft.

GERRY, *p.* 10.—Steward; lighted her lantern that night; it was a globe lantern about ten inches in diameter; it was hung up by Russell; one of the crew; hung it up in the main peak halyards about fifteen feet from the deck.

I was below then; went on deck at 8½; light was then in main peak halyards.

When I came on deck after collision, our light was in the same place, still in main peak halyards, when I went below, and came on deck was about the same.

P. 11.—I lit the lamp, and the boat keeper told me to give it to one of the boys, and I gave it to Russell; I handed it to him below, and saw him go on deck with it.

The sail was furled when I saw the light in the main peak halyards.

The lamp being in the halyards fifteen or twenty feet from the outer end of the gaff, and above fifteen feet from the deck, and about *half the length of the gaff from the mainmast.*

RUSSELL, *p.* 9.—When steward handed me light I gave it to Cochrane; did not see what he did with it; ten minutes afterwards I saw it in the main peak halyards about sixteen feet from the deck; at seven twenty took it down and trimmed it; saw it then till half-past eight, when I turned in, and it was then burning brightly; was awakened by the crash; after I came on deck I saw our light; it was then on the main peak halyards.

Took the lamp down to trim it because it was burning kind of dim; I put it back in the peak halyards; I put it there by getting up in the companion-way, and then by getting up in the gaff; the gaff was

about eight feet from the deck; I should judge that the lamp was about six feet from the end of the gaff towards the mainmast.

GILLESPIE, *p.* 8.—Saw our light after ten minutes past six in mainpeak halyard; then went below; next saw it at seven twenty brought into forecastle; was below when our light went out; when I came on deck after collision, saw a light in mainpeak halyards burning brightly.

At seven twenty light was out; I relit it, and put canvas round bottom of it.

SCHULTZ, *p.* 15.—Went below about twenty minutes past eight; at that time we had a good light up about fifteen or sixteen feet above the deck (*p.* 16). The light was considerably lower when I went on deck after the collision than when I went below; I should think that it was ten or twelve feet lower; *it was that much lower that I had to look down upon it as I stood on the pilot boat's deck.*

SMITH, *p.* 16.—Went below at half-past eight; at that time light was up in main peak halyards, about fifteen feet above the deck; when I came on deck again after the collision it was burning bright.

The light that I speak of was on the starboard side of the schooner—no, on the port side; I first saw the light in peak halyards after leaving my bed when I was getting upon the schooner's head gear.

MILLER, *p.* 21.—Light in main peak halyards; just before collision went down for oilcoat.

When I got on deck after collision looked aft and saw the light in main peak halyards about the same place I saw it first; it was lower when I looked at it from schooner, her deck was so much higher; did not look as if on deck of pilot boat; it was abaft the mainmast, about fifteen feet from the mainmast; don't think

it was any further aft when I last saw it than when I first saw it that night.

NORTON, second mate of schooner, *p.* 19.—Saw light on pilot boat the moment she struck us; it was somewhere abaft the mainmast, up in the rigging, *can't say where;* half a minute or a minute after we struck her I saw the light.

Of libellant's ten witnesses six testify to no change of place in light, viz., *Cochrane*, *John Carroll*, *Gerry*, *Russell*, who last set it, *Gillespie*, and *Miller*, who says that, after he got on deck of schooner, the pilot boat's light looked lower than from deck of pilot boat because schooner was so much higher.

These, except *Gerry*, say generally that, after the collision, it was in main peak halyards, which may mean any where in halyards down to gaff.

At sundown it appears to have been set in the peak halyards, not far from outer end of gaff, 15 or 20 feet abaft main mast, and, say 15 feet above deck. *Gerry* the only witness who fixes its place definitely, so says, fifteen or twenty feet from outer end of gaff, fifteen feet from deck, half length of gaff from mainmast. *Smith* says, at one time it was 15 feet above deck, but his evidence on this point is unreliable, because he says that, *after the collision*, it was in same place, so that it could be seen eight miles around, which is certainly false. All the libellants' witnesses take pains to repeat in the same words this obvious falsehood: that the pilot boat's light could have been seen on that night at a distance of seven miles. They probably did not know that the seventh article of the Act of Congress required the light to show only *one* mile. We submit that in the direct and flat contradiction between the witnesses on the part of the pilot boat, six swearing that the place of the light in the main peak halyards remained unchanged, and five, on the contrary, that at the time they saw it, nearest to the col-

lision, it was upon or near the deck, the weight of testimony is with our witnesses, who place it in the latter position.

Taking it as proved that at or after the collision it was on the deck, how did it get there?

The theory of libellants is that from the unstepping of the mainmast by the collision it fell to deck. This is practically an impossibility, that a globe lantern of glass, 12 inches in diameter, should fall 15 feet to its bottom on deck, and be neither broken, extinguished, nor upset, coming down like a cat upon her feet. It is, in the nature of things, wholly incredible.

There is no evidence of any such thing, and it is obviously a mere invention to account for the situation.

Admitting the mast of pilot boat to have been unstepped—for *Hawkins*, *Qua ey*, *Wm. Carroll*, and *Thomas* speak of that—three out of fourteen witnesses, there is no proof of the mast or the gaff being so far displaced as to work any such effect, or of its being thrown out of position more than a few inches, not at all so as to let a lantern attached to the halyards at a height of fifteen feet down to the deck or anywhere near to the deck. Besides, it would inevitably have been dashed in pieces.

Qualey says merely: It stood on deck, where, the peak halyards having slacked, it stood. The peak halyards had slacked, I *suppose*, by the carrying away of the peak halyards.

[Mem. Qualey had not been on deck since 7½.]

Wm. Carroll says merely: Came on deck after the collision; the light was then standing on deck, on its bottom, attached to main peak halyards; *I believe* it had been lowered by the mainmast being unstepped or broke, it slacked the halyards, and lowered the light to the deck.

Q. How do you know that the lantern was attached to the main peak halyards whilst standing on deck as you have said?

A. I saw some loose rope about it and some slack rope from the gaff, and I inferred from that that it was attached to the main peak halyards.

[Mem. Carroll had not been on deck since six o'clock.]

Thomas, who was awakened out of sound sleep by the collision, says: The mainmast had a cant aft, and that had brought the lamp down near the deck.

But Thomas was in no condition to observe, for he says: "Waking out of sleep I did not know what was the matter nor where I was; I was bewildered at the time."

All this is mere supposition, and is wholly insufficient to establish what is so nearly an impossibility. It is to be remembered that the pilot boat was at anchor and the mainsail down, which would drop the gaff down close upon the boom, and the lantern, if it fell, would necessarily fall over the boom to the deck.

The counsel for the libellants suggested that there was a gradual lettin down of the light to the deck, resulting from the collision, but the evidence is clear to the contrary of that. The master of the schooner and the men of the pilot boat saw it *on the deck* instantly after the collision, and no one suggests any gradual change or lowering.

The witnesses of the pilot boat are more competent to testify where the light was than to form any theory of how it came there. Almost to a man they were startled out of a sound sleep, and were rushing for their lives in great fright, and, as they came out of the forecastle hatch, the jib-boom and forerigging of the schooner lay across the pilot boat, between them and where the libellants claim the light to have been.

The very idea of a lowering of the light by the means suggested, is flatly contradicted by those six of the pilot boat's witnesses, who swear that it was not lowered at all.

Our theory is this: The pilot-boat's light went out as ours did by the wind. This was at 7½, midway, between sundown and the time of collision. It was then trimmed, relighted and rigged with canvas, and is claimed to have been put up by a boy, but either he put it so low that it could not be seen, except as and when the schooner saw it, or he put it up so carelessly, that it slid down the halyards, or, finding it too cold to put it up at all, he set it on the qaarter-deck where it was at the time of collision.

Russell, P. 9, says that at 7½ he took it down and trimmed it, because it was burning kind of dim, and in direct examination said nothing about putting it back.

On *cross-examination* he says:

He put it back in main peak halyard, but does not say how high—certainly not 16 feet from deck, for he says he did it by standing on companion way, and then getting on to gaff which he says was about 8 feet from deck, and putting it about 6 feet from end of gaff towards mainmast.

This, certainly, was not where it was before, nor high enough to show to higher vessels approaching. But his statement as to height is obviously false. The boom of the pilot boat, as of all such craft, was as near to the quarter deck as it was possible to place it, and, when the mainsail was let down, the gaff must have rested on the sail and boom. He could not otherwise have stood upon the gaff unless the gaff was so supported. The idea of the gaff, when the sail was down, being eight feet from the quarter deck, is a gross absurdity.

Now, the only witnesses who claim to have seen it after it was retrimmed, or at a time which must have been after that, are

Thomas, who speaks of it as in the main peak halyards, not fixing any height, and says that, as he lay on a locker in the cabin, he saw the light of it through the skylight—which admits of its being very low.

Gerry, who merely says that at half-past eight it was in the main peak halyards, giving no height.

Schultz, who was not on duty, but says that *about* eight twenty he saw it in the main peak halyards, about fifteen feet from deck, which does not agree with Russell.

Smith, who says on direct, that at half past eight he saw it about fifteen feet from deck, but on cross-examination he says, "I *first* saw the light in the peak halyards of the pilot boat, *after leaving my bed, when I was getting up on the schooner's head gear.*"

As to both of these witnesses, there is nothing really to fix the time when they happened upon deck. They were not on duty, and under such circumstances a sailor's "about half past eight" may have been at any time after dark.

And *Miller*, who claims to have been on deck "just before collision." He merely says that, when he went below just before collision, the light was in the main peak halyards, but he notes no change of place from that after collision, except that from schooner's deck, which was higher, it appeared lower than from pilot boat's deck.

Certainly, if there had been all the time on the pilot boat such a light as her witnesses describe in the place in the rigging, where it is claimed to have been, and visible seven miles as they all say, or even one mile, it must have been seen by the schooner before the mate who was on the lookout forward relieved the captain at the wheel.

Upon the whole evidence, we claim that the only

well sustained and consistent theory of the case is, that, when the schooner approached the pilot boat, the light of the latter rested upon deck or so near the deck as to be indistinguishable from that position, and could not be seen until our captain and mate saw it, just as the schooner was upon her, and too late to avoid the collision.

Sixth.—*The want of any lookout on the pilot boat at the time of collision is conceded. The pilot boat at anchor in the night is detected in the predicament of not having a soul on deck. And certainly this must be pronounced a fatal fault, if any heed is to be paid to the settled law on the subject of an anchor watch.*

In this situation the court will most closely scrutinize, and receive with many grains of allowance, the evidence of Miller, who was last on deck, but claims to have gone below for his coat, "just before the collision."

It will be observed that no other man but Miller pretends to have been on deck for a long time before the collision, except Thomas (p. 17), who says, he "had been on deck certainly, inside of ten minutes of the collision before it." But he, on cross-examination admits that he had been asleep, at the time of the collision, "about five or ten minutes," and of course a man's opinion as to how long he has been asleep is of no value, and his measure of "just before" is all we have to measure the time during which the deck was utterly deserted. Certainly here is a very suspicious and doubtful bit of testimony.

What we claim is that the absence of any lookout on the deck of the pilot boat, at the time of the colli-

sion, must be deemed to have contributed to the collision. The authorities are clear on the point.

The case of *The Indiana* (1 *Abb. Adm., p.* 330), was in many respects similar to this case. The steamboat *Indiana* was on her way down the Hudson River, one dark foggy night, having canal boats in tow. The schooner *Egremet* was at anchor in the middle of the river, near Fort Lee.

In passing, one of the canal boats struck the schooner, doing much damage, and the steamboat was libelled therefor. The ground of defence was the negligence of the schooner, as shown: 1st, by her being anchored, improperly on such a night, in the middle of the river; 2d, by her having no proper light; 3d, by her having no watch.

On the second point the evidence was conflicting, but seems to have established the fact, that, although there was a light, the wick was not properly trimmed or that, from some lack of attention, it burned only dimly.

The libel was dismissed on the last two points.

"On the last point the court, Betts, J., said: "the "omission of the libellants to maintain a competent "watch on deck * * * * was an act of gross "negligence on their part. * * * * A lookout "doing his duty on deck could have secured the "schooner from the accident. He could have given the "steamer timely warning, by hailing or by waving a "light, and especially would have acquitted the schooner "of fault in respect to a standing light on the vessel by "saying, that the lamp was kept in proper condition, "and furnished the light required by law. Aside "from the positive duty to maintain such a light, en-"joined by the local statute, these acts of omission are "made by the maritime law evidence of culpable inat-"tention and want of precaution, which bar the "schooner of all claim to damages she may have "suffered in consequence of the neglect."

In the case of "*the Clara*," 13 *Blatchford, Circuit*

Court Rep., 509; Mr. Justice Hunt, in dismissing the libel solely on this ground, said: "I hold that the absence of an anchor watch on the vessel is fatal to "her right of recovery."

The Mary J. Wilder, Taney's Cir. Ct., Dec., 567.
The Lydia, 4 *Benedict*, 523,
Article 20, *of the Regulation*, 13. *Stat., p.* 59.
The Masters v. Raynor, 1 *Brown's Adm. Rep.*, 342.
The Sapphire, 11 *Wallace*, 170–171.

The state of the wind at the time which is admitted by the pilot boat's witnesses to have made it a matter of extreme difficulty to have kept her light burning, imposed upon her an imperative necessity for keeping a strict and vigilant anchor watch. Besides, such a watch would have seen the approach of the *Wanata* though her lights were out, and lying there where vessels were constantly passing up and down, she was bound to know that they, being by their motion still more exposed than she was to the same difficulty, might be approaching without a light.

The night was not so dark, but that the *Wanata* might have been seen approaching. A single hail from the pilot boat might have been heard upon her. And as she was well in hand at the time, under full command of her helm, she might have been brought up into the wind or some other movement made to arrest her progress and to clear the pilot boat.

Under the circumstances we submit that the case comes clearly within those cited where the absence of an anchor watch was held fatal.

Seventh.—The pilot boat was obviously anchored in an unsafe and improper place. She was right in the track of vessels sailing up and down the coast. The evidence shows that she was very near them that night as she lay, and, no matter how many vessels had anchored there before, it cannot excuse her.

Gillespie, p. 9. Saw all kinds of vessels that night going to southward and northward.

Russell, p. 10. Noticed a number of vessels sailing and steamers that night before turning in.

Schultz, p. 15. Before I went below that night had seen vessels sail up and down the coast.

(She lay about half a mile from shore.)

Johnson, p. 21. Vessels go along the coast half a mile to a mile from the beach.

Hawkins, p. 23. I have been sailing up and down the coast the last three years nearly; I never saw a vessel anchored in the place where the pilot-boat was before.

Weeks, p. 26. I have sailed more or less up and down the coast for thirty years; never knew of a vessel being anchored where that pilot-boat was; it was right in the track of vessels going down the coast, with wind off shore.

Her situation, thus clearly proven, greatly aggravates her faults of want of light and of lookout.

Eighth.—The exclusion by the Commissioner of the original cost of the pilot boat in 1863, in connection with the evidence of the decline in the market value of vessels generally, and her specific depreciation, was erroneous. The case was a peculiar one, there having been no sales of pilot-boats from which market value could be derived. The only evidence of value on the part of the libellants had been mere estimates, and to test these it would seem that the evidence of her cost was legitimate evidence; that she cost less, and that there had been a decline in the value of vessels generally. It was a matter of importance, because the exclusion of the evidence enabled the libellants to get a valuation nearly twice as high as had been put upon her by the claimants' witnesses.

Ninth.—The *Wanata* having been appraised at $16,000, and released upon the filing of a stipulation for value in that sum, the stipulation took the place of the *res* in the further progress of the cause; and, as this court has expressly decided, it bore no interest, any more than the vessel could have done had she remained in court, therefore, the addition of interest in the decree of the Circuit Court, to the amount of the stipulation for value, was clearly error. Including such interest in the costs was wholly without precedent or authority, and did not mend the matter.

Hemmenway vs. *Fisher*, 20 *Howard*, 258.
The Ann Caroline, 2 *Wallace*, 538.
The Steamer Webb, 14 *Wallace*, 406.

True, this case differs from the two last cited in this, that in those cases the decree of the District Court for damages exceeded the stipulation for value, while here it was for just that amount, but that accidental circumstance does not alter the principle, or increase the

power of the Circuit Court in the premises. All that that court had before it, representing value, to condemn, was the same stipulation for value in $16,000 which had been substituted for the *res*.

Nor could interest be awarded by the Circuit Court as damages in excess of the value of the *res* in court against the stipulators for costs and damages upon appeal from the District to the Circuit Court, for interest is not costs, nor is it damages within the sense or purpose of that stipulation. When a stipulation is given for costs and damages on appeal in a suit *in rem.*, it is not by way of addition to the original stipulation for value but for such damages only as the libellant in such suit is entitled to recover, and the above cited cases establish that he is not entitled to interest. In admiralty the cause in the Circuit Court is a new cause, and is heard *de novo*, and that court decrees damages in the amount it deems just, as an original decree and, of course, without interest. In case of the insolvency of the original stipulators for value, the stipulation for costs and damages on appeal might, besides securing the costs of appeal, be made available for securing a deficiency so occasioned up to and within the amount of the stipulation for value, the *res* in court, but never in excess of it, by way of interest or otherwise.

It is obvious, in this case, that the learned Circuit Judge, in his opinion, meant only to award as damages the $16,000, the amount of the *res*, subject to his jurisdiction. He evidently thought that amount excessive, and reluctantly acquiesced in the opinion of the District Judge so fixing it. The addition of interest to that amount crept into the decree. But even there it is not adjudged as *damages*. It is awarded specifically as *interest* and as part of the costs, for which there was no power in that court.

Of course, in the cases of *The Ann Caroline* and *The Webb*, similar stipulations for costs and damages on appeal were given as in this case

and in the same form. No appeal could be taken without them, and the form is of immemorial use. And if, by means of that stipulation, the value of the *res* in court could be increased by way of interest or otherwise for the benefit of the libellant, the appellees in those cases would not have been limited by this court, as they were strictly, to the amount of the original stipulation for value without interest, but would have been awarded in addition interest on that amount at least to the extent of the stipulation on appeal, after providing for the costs on appeal therefrom. So that this court, in the cases cited, must be deemed to have passed upon the question in any form in which it may be presented.

As to the decree of the District Court so far as that awarded costs in excess of the $250 stipulated for costs, it will be conceded to be erroneous.

If interest should be claimed in this court upon the decree of the Circuit Court rightly adjusted, we submit that a review of the evidence taken before the Commissioner will more than confirm the doubts expressed in the opinion of the Circuit Judge as to the damages awarded, and satisfy this Court that $16,000 now, without interest, is an ample indemnity for all the losses sustained by the libellants. Their vessel was a pilot boat six years old, which, as we offered to show, cost originally less than $16,000; she had depreciated by ordinary wear and tear, like all vessels, at a considerable rate per annum; besides which, as the evidence clearly shows, there had been in the interval a steady and large depreciation in the market value of all vessels. We submit that, in the exercise of the discretionary power reserved in this Court as laid down in *Hemmenway* vs. *Fisher*, to add further damages by way of interest to the $16,000, would give the libellants more than they ought to have, and would work injustice to the appellants.

Tenth.—The judgment appealed from should be reversed, and the libel dismissed, or at least the damages divided; or, if not that, then at any rate the case should be sent back for a new computation of damages upon proper evidence. And in any event, the decree appealed from should be reduced to the amount of the appraised value of the *Wanata*, $16,000, and costs, and no interest or costs in this court should be allowed.

JOSEPH H. CHOATE,
Of Counsel.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1877.—No. 86.

GEORGE SPARROW & DAVID L. TURNER, CLAIMANTS OF THE SCHOONER "WANATA," HER TACKLE, &C.,

Appellants,

vs.

JOHN W. AVERY, W. A. AVERY AND W. H. M. JOHNSON, EXECUTORS OF JOSIAH JOHNSON, DECEASED, ET ALS.,

Libellants and Appellees.

BRIEF FOR APPELLEES.

J. P. LEDWITH,
Proctor for Appellees.

WILLIAM ALLEN BUTLER,
Of Counsel.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.

1877.

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Appellants,

vs.

JOHN W. AVERY, W. A. AVERY, and W. H. M. Johnson, Executors of Josiah Johnson, deceased, John Carroll et als,

Libellants and Appellees.

Brief for Appellees.

STATEMENT OF THE CASE.

This cause comes up on an appeal from a decree of the United States Circuit Court for the Southern District of New York, in a cause of admiralty jurisdiction arising from a collision between the schooner *Wanata* and the New York pilot-boat *Josiah Johnson* off the coast of New Jersey, March 6, 1869, resulting in the

total loss of the pilot-boat and of certain property on board of her, to the damage of libellants, as claimed, in the sum of $23,000.

Libel, Record, fol. 2.

The libel was originally filed March 8, 1869, by Josiah Johnson as owner of the pilot boat *Josiah Johnson*, and by John Carroll and eleven other persons, co-libellants, as owners of clothing and other property on board. Pending the suit, the libellant Johnson died, and, by consent, the action was continued in the name of his executors.

See Stipulation, Rec. fol. 3.

The District Court adjudged the schooner to have been in fault, and awarded to the libellants, for all their damages, the sum of $16,000, besides costs.

Decree of District Court, Rec., fol. 95, *entered February* 1, 1873.

Opinion of BLATCHFORD, *J., in the "Wanata,"* 4 *Ben.*, 310.

The Circuit Court, on the same proofs, affirmed the decree, and adjudged that the libellants were entitled to recover the sums awarded by the District Court, with interest, amounting in the aggregate, with costs, to $17,407,47.

Decree of Circuit Court Rec., fol. 112, *entered December* 3, 1874.

Opinion of WOODRUFF, J., *fol.* 107.

The claimants appealed to this court.

Petition of Appeal, Rec., fol. 120.

THE LEADING FACTS ESTABLISHED AT THE HEARING ARE AS FOLLOWS:

The pilot boat, with a company on board of thirteen, all told, six Sandy Hook pilots, and the rest boat's

crew (*Gillespie, Rec. fol.* 18), was lying at anchor in four fathoms of water, about half a mile from the New Jersey shore. She had lost or burst her foresail off shore in the afternoon of March 6, 1869, and came in shore to repair it, and cast anchor about 6 P. M. (*Russell, fol.* 19; *Carroll, fol.* 23). "The pilot boat was anchored about a quarter to half a mile from shore, in about four fathoms water" (*Qualey. fol.* 26). "Barnegat light bore about south of us, distant from twelve to fifteen miles" (*Ib., fol.* 26). The wind was northwest, and blowing very hard. The sails of the pilot boat were furled, and when she anchored she tailed off southeast and headed northwest (*Russell, fol.* 18). "This night was dark, but it was clear at the time of the collision *Qualey, fol.* 26; *Smith, fol.* 32). "Not a thick night, clear" (*Sparrow, Claimant's wit., fol.* 58).

The place where the pilot boat was is a well-known anchorage ground. Vessels anchor all along the coast, between Barnegat and Long Branch (*Johnson, Rec., fol.* 41; *Wilkins, fol.* 59; *Munsell, fols.* 59, 60).

The pilot boat had the proper light for a vessel at anchor, set at sundown, and burning brightly during the evening and at the time of the collision.

The evidence on the part of the libellants was conclusive on this point.

Of the thirteen persons on board, eleven were produced and examined as wituesses. There is no conflicting evidence as to the light. It was a globe lantern ten inches in diameter (*Gerry Rec.*, fol. 20). Gerry, the steward, lighted it in the forecastle (*Ib., fol.* 20), and it was hung in the main peak halyards about sixteen feet above the deck, about six feet from the end of the gaff toward the main mast, before six o'clock P. M. (*Russell, fol.* 18. *Cochran, fols.* 26, 27, "*went below last before the collision when my watch out at six o'clock. The light had been set before I went below, in the main peak halyards.*" *Ib., fol.* 27.) Qualey, one of the Sandy Hook pilots on board, testified (*fol.*

24), "I went below shortly after we came to an anchor. Time, shortly after sundown. Before I went below a light had been put up in the main peak halyards." (*See also Carroll, fol.* 28; *Schultz, fol.* 30; *Smith, fol.* 31; *Thomas, fol.* 33). The light was blown out by the wind, and then re-lit and trimmed, about twenty minutes past seven, and replaced in the peak halyards, (*Russell, fols.* 18, 19; *Thomas, fol.* 34); it was burning brightly from that time until the collision (*Ib., fols.* 19, 33).

Miller, the anchor watch, who had been on deck from eight o'clock, keeping a lookout for over an hour, and up to within a moment of the collision, and had just left the deck to get his oil coat, and had not reached it when the collision occurred, testified that from eight o'clock to the time of the collision the light burned brightly (*Miller, fols.* 40, 41).

Every man on the boat testifies distinctly and positively to the fact of the light being set in the main halyards, at a proper height, and that it burned brightly (*see fols.* 16, 18, 19, 20, 23, 24, 27, 28, 30, 31, 33, 40, 41).

The testimony of Norton, the second mate of the *Wanata*, shows that the light of the pilot-boat was seen on the schooner, and that it was up in the rigging (*Norton Rec., fol.* 37). The allegation of the answer, repeated in the evidence of the master of the *Wanata*, that, *after the collision*, the lantern was seen "on the deck of the pilot-boat," is fully explained by the fact that the mainmast was "unstepped" or broken by the collision, which gave it a cant aft, slackening the halyards, and letting the lantern down (*Carroll, fol.* 28; *Thomas, fols.* 34, 35; *Hawkins, fol.* 46).

The schooner's witnesses all observed the light on the pilot-boat from the greater elevation of the deck of their own vessel. The pilot-boat was low in the water, and the schooner was ten or twelve feet higher than the forecastle hatch of the pilot-boat (*Cochran, fol.* 27).

The schooner left New York near 3 o'clock in the afternoon of the 6th March; the wind was blowing quite strong when she left (*Hawkins' Rec., fols.* 42, 46). After passing Sandy Hook the weather was squally; the mainsail was reefed before supper (*Worth, fol.* 56; *Sparrow, fol.* 58); a little after 6 o'clock an attempt was made to set the schooner's lights, but they were blown out by the wind (*Hawkins, fol.* 42); "they would go out as fast as they would light them; they were attempted to be set in boxes in forward rigging, about twelve feet above the deck; that was repeated several times; they would blow out as fast as they would light them; they had canvas around them, but they would blow out even then" (*Sparrow, fol.* 58); "The wind blew out our lights and they would not burn" (*Weeks, fol.* 50); "There was no light on the schooner at the time of the collision" (*Thomas, fol.* 35). The master of the *Wanata* determined to go under Barnegat and anchor. He was heading about S. by W. ½ S. (*Hawkins, fol.* 47). After supper the crew of the schooner were steadily engaged in double-reefing the foresail and furling the flying-jib and then in overhauling the chains and clearing away the anchors. This work continued up to the time of the collision (*Hawkins, fols.* 46–47; *Weeks, fol.* 52; *Worth, fol.* 55). The second mate testified that they got through reefing a minute or two before nine (*Norton, fol.* 38), reefing the foresail was "a pretty hard job," "all hands, including the second mate, went at that;" "they were at that some time over an hour" (*Hawkins, fol.* 47). After finishing this work they began clearing the decks, and *were waiting for a light* to overhaul the chains when the collision occurred (*Norton, fol.* 38).

There was no lookout forward on the schooner at the time of the collision. The answer, verified March 9, 1869, avers that the mate had been forward on the lookout, but about five minutes before the collision went aft to relieve the captain, who had been at the wheel, and was suffering from the cold, and that the

captain then stationed himself *upon the house of the schooner upon the lookout* (*answer, Rec., fols.* 12, 13).

The captain testified that the mate was at the wheel at the time of the collision (*Hawkins, fol.* 43). But after leaving the forward deck and before he took the wheel the captain gave him the order to have all the chain overhauled, and he then went forward to set the men at it and came directly aft again, but how many times he went forward the captain cannot say. It was after this that the mate took the wheel and the captain then *went down into the cabin* in the house, he could not "tell what for, whether for a chew of tobacco or what," and did not remain over five minutes, then went on the house. He had just got on the house when he saw the light (*Hawkins, fols.* 47, 48).

It is thus apparent that for some time before the collision there was no lookout forward and none on the deck during the time preceding the collision that the captain was in the cabin. It is not pretended that any one except the captain and mate were doing duty as lookouts.

The schooner struck the pilot boat about midships, on the starboard side. The boat sunk in about seven or eight minutes. Her company were saved by getting on the starboard bow of the schooner; *seeing their way by the light of the pilot boat* (*Miller, fol.* 41); the schooner's bow sprit and jib boom extended entirely over the pilot boat (*Smith Rec., fol.* 32; *Russell, fol.* 19; *Gerry, fols.* 21–22; *Carroll, fol.* 24).

The value of the pilot boat and of the effects of the libellants on board was established by evidence before the United States Commissioner, to whom it was referred to ascertain and compute the amount of the damages. The *Johnson* was substantially a new boat. George W. Roosevelt, a shipwright of thirty years, experience, who knew the pilot boat, and who had repaired her a short time before the cruise on which she was lost, testified that she was worth

$18,000. The repairs were general, she had two new masts and a new suit of sails. "Her condition in every respect was just as good as she could be at the time." (*Roosevelt, Rec., fol.* 63). The finish and rigging of a New York pilot boat is of superior quality. This boat was worth $18,000 (*Griffiths, fol.* 64.)

Other experts called by the claimants gave different values based on their observation and experience, but not upon an actual connection with the vessel or knowledge of her condition at the time of the loss.

The claimants also produced a clerk in the employ of a firm which furnished ship chandlery to the *Josiah Johnson*, in 1863 and 1864, five years prior to the collision, and found certain entries in the firm's books of account showing supplies made to the vessel in those years, and offered to prove by this clerk the cost of building and fitting out the vessel (*see Record, fol.* 80), to show that her cost was less than her value at the time of her loss, and also as evidence bearing on the question of market value (*Ib., fol.* 80). This offer was objected to and the objection sustained by the commissioner and the district judge (*Ib., fol.* 80).

The value of the articles lost was proved by their respective owners (*Rec., fols.* 81–86).

The commissioner found the value of the pilot boat to be $15,000, and the aggregate value of the articles lost to be $1,305.06, making in all $16,305. But the stipulation for value given by the claimants on the release of the *Wanata* at the commencement of the suit, having been $16,000, a deduction was made from the ascertained value of the pilot boat, so as to make the entire amount awarded only $16,000 (*Report of Commissioner, Rec., fols.* 88–91).

Exceptions taken by the claimants to the commissioner's report were overruled, and a decree was

entered for $16,000 and costs, which was affirmed on appeal.

Decrees, Rec., fols. 95, 112.

The several sums awarded to the libellants, other than the owners of the pilot-boat, for the personal effects lost by them, were small, and did not amount in the aggregate to $2,000; the largest of these sums being $229.80 (*See Report of Commissioner, fol.* 88). It was claimed by libellants that no appeal would lie to this court, by the claimants, in respect to the sums so awarded, and that the respective libellants were entitled to have their several claims satisfied at once. But the Circuit Judge, for reasons stated by him, settled the decree in such form as to allow an appeal from every part of it (*Rec., fols.* 109–111).

POINTS.

First Point.—The District Court and the Circuit Court having, upon full hearing, and upon the same proofs, concurred in the decision that there was no fault on the part of the pilot boat, and that the collision was caused by the fault of the schooner, this court will not reverse the decree, unless plain error is shown requiring a reversal. Every presumption is in favor of the decrees below.

The Juniata, 3 Otto, 337.
The Hypodrome, 6 Wall, 216.
The Grace Girdler, 7 Wall, 204.
The Quickstep, 9 Wall, 665.
The Spray, 12 Wall, 266.
The Commerce, 16 Wall, 33.
The Potomac, 2 Blk., 581.

Especially should this court refuse to reverse in a case of collision between a vessel under sail and one at anchor. In such cases the presumption is that the fault is on the vessel which is in motion.

The Scioto, Davies, 359.

The Miramichi, Stewart's Adm. Rep. for Lower Canada, 237, p. 240

By the French Maritime Code it is matter of express regulation that when any vessel not provided with proper lights comes in collision with another properly lighted up, the former shall bear the damage. *Reg.* 302, *cited in Pritchard's Ad. Dig., p.* 202.

Second Point.—Upon the facts proved, the schooner was clearly in fault, and both the District and Circuit Courts properly so held.

1st.—The schooner left New York, about three o'clock in the afternoon, March 6, 1869, the wind blowing quite strong from the northwest, and steadily increasing, notwithstanding which all her sails were set. After it was found to be impracticable to keep her lights burning, the captain determined to go in shore and anchor. The reefing of the foresail did not begin until half-past seven (*Norton, 2d Mate, fol.* 38).

The schooner, with her jib and fore stay sail set (*Russell, fol.* 19), and her main sail and foresail reefed, was sailing with the wind, and at such speed that she had made the distance between Sandy Hook and the place of collision, about 25 miles, in three hours (*compare Haw-*

kins, fol. 46, and *Johnson, fol.* 41). She was going between 6 and 8 knots per hour. Her speed is shown by the direction and strength of the wind, and the force of the blow when she struck the pilot boat. It was clearly her duty when seeking an anchorage and standing in towards shore, without lights, on pilotage ground, and on a course where she would encounter vessels at anchor, or coasting vessels under way, and when according to her own story, it was difficult, if not impossible to keep a light burning, to use the utmost vigilance and precaution, and to watch closely to avoid the danger of collision. This she wholly failed to do.

2d. The evidence established the fact that the schooner at the time of the collision, had NO LOOKOUT (*see Statement of Facts, ante. p.* 5). This was gross negligence. The averments of the answer admitted that the mate was the only lookout forward, and that he had "gone aft *before the collision* took place" (*Answer, fol.* 12). The schooner's lights were out, and all hands on deck, except the captain and mate, had been busy reefing the foresail (*Hawkins, fol.* 47), and just before the collision the mate was backwards and forwards getting from the captain, who was at the wheel, and giving to the men on deck, the order to overhaul the chain (*Ib., fol.* 47; *West, fol.* 41; *Worth, fol.* 56). The mate was at the wheel before when the collision occurred, and no *one was on the lookout forward*. The captain had gone into the cabin in the house on deck abaft the mainhatch, and was there until just a moment before the collision (*Hawkins, fols.* 47, 48; *Weeks, fol.* 49).

The absence of a lookout, always imputable

as a fault, was the grossest negligence under the circumstances of this case.

Chamberlain vs. *Ward*, 21 How., 548; *see Opinion of* CLIFFORD, J., *fol.* 570.
The Ariadne, 13 Wall, 475.

Third Point.—The pilot boat was free from fault.

1st. She was securely anchored in a proper place, with her sails all furled, and with a competent man on deck, who had been on the watch from eight o'clock P. M. He was on the port side of the quarter deck until just before the collision, and was in the act of getting his coat from the forecastle, having just left the deck for that purpose, when the collision occurred. Had he been on deck he could have seen nothing, as the schooner had no lights.

2d. The pilot boat had the light required by law for vessels at anchor properly set and burning. The regulation applicable to *all vessels at anchor* is as follows:

"*All vessels, whether steam vessels or sailing vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern, of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon and at a distance of at least one mile.*"

See Act April 29, 1864, 13 *U. S. Stats., at L.* § 58, *Article* 7.

The evidence showed that the pilot boat had a light fully conforming to the regulation, and that it was kept burning brightly, also that, before the collision, it was seen from the schooner by the second mate (*Norton*, fol. 37), and, after the collision, by all hands on the schooner. The circumstance of its being seen at a lower point than it was before the collision is fully explained by the greater height of the schooner's deck, and by the canting aft of the mainmast of the pilot-boat, in consequence of the blow given by the schooner (*see Statement of Facts, ante, p.* 4).

3d. The pilot-boat was not required, while at anchor, to exhibit the lights prescribed for sailing pilot-boats by article 8, viz.: "a white light at the masthead" and "a flare-up light every fifteen minutes."

(*a*). Article 8 applies only to pilot-boats which are "sailing," and not at anchor. There are no "pilot-boats" propelled by steam; the "pilot-boats" of our pilotage service are a well-known and distinctly defined class of vessels, and steam-tugs under the charge of a pilot are not embraced within this classification.

(*b.*) If it be conceded that the designation "sailing pilot vessels," in article 8, is limited to pilot boats propelled by sails, the directions of the article do not apply to such vessels while at anchor. The regulation for vessels at anchor, by its express terms, applies to ALL VESSELS. There is no exception as to pilot vessels, and no other rule prescribed for pilot vessels at anchor than that which applies to all vessels at anchor. Article 8 has no reference to vessels at anchor and art. 7, pre-

scribes the lights to be "*exhibited*" by a stationary vessel, as distinguished from those to be "*carried*" by vessels when under way.

See the meaning and force of these regulations, clearly stated by BLATCHFORD, J., *in his opinion, printed at the end of this brief.*

(*c.*) If pilot vessels at anchor were to show the same lights as when under way, it would mislead. A vessel at anchor is distinguished by the absence of the masthead and colored lights, and by the exhibition of a white light. This furnishes a safe guide to an approaching vessel with a competent lookout, while the exhibition, when at anchor, of the lights indicating that the pilot boat was in motion and under the rules of navigation applicable to her in that condition, would be to invite the very dangers against which the regulations are intended to provide.

(*d.*) By claimants' own showing it was impossible to use a flare up light on the night in question; the schooner sailing with the wind could not keep her enclosed lights burning and the pilot boat, headed against the wind could not have kept an open light burning at all. It would have been blown out instantly. Besides, in the absence of a lookout on the schooner there is no proof that any thing which could have been done on the part of the pilot boat would have prevented the disaster.

Fourth Point.—(In Reply to Appellant's Brief.)

First.—The attempt to excuse the schooner on the ground of inevitable accident, or *vis major*, wholly fails. It comes too late. No such defense is set up in the answer. On the contrary, it expressly avers that "*the collision occurred through the fault of the persons on board of the pilot boat.*" (*Answer, Rec. fol.* 14). It is nowhere suggested, in the answer or in the evidence, that there was any such violence of the elements, as to make it impossible for the schooner to take the ordinary and proper precaution of keeping a lookout on her bow. In fact, it is claimed on her behalf in the answer, that her whole company were on deck and "exercising every precaution *for her safety*, which prudence suggested" (*Ans., p.* 7, *fol.* 13); if the storm did not prevent such exertions for the safety of the schooner, it certainly was not such a *vis major* as to excuse her from taking reasonable precautions for the safety of other vessels.

"Inevitable accident, * * * must be understood to mean a collision, which occurs when both parties have endeavored *by every means in their power*, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident."

The Morning Light, 2 *Wall.*, 550, *p.* 560.

"Inevitable accident" as defined by Dr. Lushington, is "that which the party charged with the offence could not *possibly prevent* by the exercise of ordinary care, caution and maritime skill."

The Virgil, 2 *W. Rob*, 201.

The violence of the elements seldom furnishes

the excuse of inevitable accident unless it disables a vessel and makes her uncontrollable (*See the cases cited on appellant's brief*). This is not such a case. The court cannot say that the collision could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill. This newly broached theory is an after thought and derives no support from the pleadings or the proofs.

Second. The effort of the appellants is to excuse the schooner for running at a speed of from six to seven or eight knots per hour without lights, and without a lookout, on the plea that "the tempest overtook her" (*p.* 9), "catching the vessel under full sail" (*p.* 11,) &c., and that the "great business" in hand was to "take in sail," "in the stress that was upon them as they approached the anchorage ground" (*p.* 12). But the main sail was double reefed before supper, which was at half past five o'clock, according to the evidence of Worth, one of claimants' witnesses; "The mainsail was reefed before we set the lights; had not passed Sandy Hook when the main sail was double reefed" (*p.* 29, *fol.* 56.) Sparrow's evidence is to the same effect: "They double reefed the main sail before supper" (*p.* 30, *fol.* 58.) Weeks, the first mate, cannot say whether the main sail was reefed with daylight or not (*p.* 27, *fol.* 51.) This shows that while inside or about abreast of Sandy Hook, the schooner was fully apprised of the gale, and that she was not overtaken by it suddenly, under full sail. It was a fault to carry all sail in view of the increasing wind. It was not until the trouble with the lights, which is hardly satisfactorily accounted for if they were in perfect order, that the schooner was run towards shore for an anchorage (*Weeks, p.* 26, *fol.* 50). From

Sandy Hook to Barnegat is full 40 miles (*Ib.*, *fol.* 50 *Johnson p.* 21, *fol.* 41). The schooner passed Sandy Hook between five and half-past five o'clock, and was at the place of collision, 25 miles to the south and west of Sandy Hook a little after nine. During the run of three hours and a half the gale, though strong, was not so violent but that all hands could and did work on deck, and it is not pretended that it was impossible or dangerous for a lookout to have remained on the schooner's bow, while approaching anchor ground which was the time to increase, not omit, this necessary precaution. The answer to the questions on page 13 of appellant's brief is that no unforeseen emergency or sudden stress of weather existed which absolved the schooner from the imperative obligation of keeping a lookout. But perhaps an equally conclusive answer may be given by asking another question, viz: If the collision was the result of "inevitable accident," why does the answer charge it on the pilot boat?

Third.—The claim that the pilot boat had no proper light is not only wholly unsupported by the evidence, but is directly at variance with it.

The labored attempt to show that the light of the pilot boat was either not visible at all or was at too low a point, utterly fails to disturb the positive, concurrent, and consistent evidence on the part of the libellants. Four of the witnesses were licensed Sandy Hook pilots—men trained and qualified for special and arduous sea service, and perfectly familiar with all the rules and incidents of navigation in the waters they frequent—John Carroll, William M. Qualey, William Carroll, and Lewis A. Thomas. Each of them testifies positively to the fact that the boat's light was set in the main peak halyards,

and was burning brightly before and at the time of the collision, and so that its light was shed in the direction of the schooner; and they are confirmed by the evidence *of every one of the other seven men on the boat.* Add to this the evidence of the second mate of the schooner, that he saw the light of the pilot boat before the collision, and that of the captain that he saw it just as he got on top of the house, also before the collision, and of the mate that he saw it just after the collision, and nothing remains except the fact testified to by some of the witnesses that it was lower in position after than before the collision. Out of this fact a theory is sought to be constructed that the light was standing on the deck or in close proximity to the deck, and was not hoisted above the deck. This theory, even if it has some support in evidence, would not destroy the positive testimony of a dozen witnesses who testify to a state of facts wholly inconsistent with it. If the light was in the main peak halyards above the deck, up to the time of the collision, it is wholly immaterial where it was after the collision. But its being on or near the deck after the collision is fully accounted for (*ante, p.* 4). Because every witness does not swear exactly as to its position after the collision, when all was confusion and alarm, does not change the state of facts existing before the collision, positively testified to, and not contradicted by a particle of proof.

But the evidence is not contradictory as claimed. The libellant's witnesses testify, (1), as to the *position* of the light *before the collision,* and all swear it was above the deck, in the main peak halyards; (2), as to its *position after the collision,* and all who testify to this swear that it was still *in or attached to the halyards,*

but either on or near the deck, the mainmast having canted aft and the halyard having slacked; (3), as to its *condition* after the collision, as to brightness, and all swear it was in the same condition as to brightness *after* as *before* the collision.

Appellant's counsel misapprehends and confuses the evidence by treating the evidence as to the light's being *in the same condition* as if it was evidence that it was in the *same position*. *Cochrane, John Carroll, Gerry, Russell, Smith* and *Gillespie* all speak of its *position* as " in the halyards," and of its *condition* as burning bright, so that it could be seen six or seven miles, &c. (*See fols.* 27, 23, 21, 19, 17). *Smith* does not say it was in the same place after the collision; he speaks expressly of the *condition*, not the *position* of the light (*fols.* 31, 32). *Miller* alone speaks of the light being in about the same place and this is doubtless true and no conflict with the others, because he was the anchor watch and on deck, and being absent for only a moment, got back to the deck before the mast canted aft and the halyards slacked. *When he got on to the schooner* and looked again it was lower (*fol.* 41).

Thus the evidence, on a careful review, wholly fails to support the appellants' theory, or to affect the positive testimony of the libellant's witnesses. It was no miracle that the lantern did not break. It was still held by the halyard, just as a flag at half-mast would be held by the rope, while its pole or staff might, under a blow, be shoved from its upright position.

Fourth.—The assertion that the pilot boat had no lookout or anchor watch is unwarranted, and there is no ground for imputing fault in this respect to the pilot boat.

She had an anchor watch. There is no more dispute as to this fact than as to the fact that she was at anchor. Nor is there any dispute that the watch was attending to his duty. The circumstance that he was for a moment absent from the deck, going for his coat, is the sole foundation for the statement of the "want of any lookout." If all hands had been on deck, and had seen the schooner, and attempted to hail her in the teeth of the wind, blowing as described by claimant's witnesses, it would have been of no avail. The pilot boat was helpless, and the schooner without lights and without a lookout, and disregarding the light which was the only signal the boat could possibly give, dealt the inevitable and fatal blow. But the destruction which it caused was in no sense due to the want of an anchor watch, or of any other precaution on the part of the pilot boat.

The cases cited on appellants' brief are all cases in which the evidence showed a clear failure on the part of the injured vessel to take ordinary precautions for safety while at anchor.

Fifth.—The pilot boat was in a proper place. Half a mile off the New Jersey shore in four fathoms of water is a lawful anchorage. If a vessel exhibits the light required by the regulations there is no rule which prescribes where she must lie. Besides, the evidence fully supports the decision of the courts below on this point.

N. B.—The other grounds embraced in the appellants' brief (which was not furnished to the counsel for appellees until after the former portions of this brief were in type) are sufficiently covered under other heads of this brief.

Fifth Point.—There was no error in the award of damages to the owners of the pilot boat.

1st. The chief evidence of value given on behalf of the owners of the vessel was that of the experienced and competent shipwrights who had thoroughly repaired her shortly before her loss. (*Roosevelt, Rec.*, fol. 63, *Griffiths, fol.* 65).

The evidence on the part of the claimants was that of shipbuilders who had never examined the *Josiah Johnson*, and did not know her condition, one of whom gave what he called "a scattering answer," as to her value in 1868, (*Williams, fol.* 66), another of whom never saw the vessel since 1863. (*Bedell, fol.* 68), another who did "not know anything about her condition" (*Steers, fol.* 69). another who was "not able to give an opinion" (*Van Duzen, fol.* 73), and another who when asked her market value in March, 1869, answered: "I should say her value was between $8,000 to $10,000, from what I saw of her. *I did not know her condition* (*Waterbury, fol.* 74).

There was no evidence as to actual market value to conflict with the positive testimony on the part of the libellants.

The Commissioner gave due weight to the evidence as to deterioration, and he would have been justified in finding a larger value than he actually found.

2d. The objection to the offer of evidence to show by a clerk, and from entries from a ship chandler's books, the original cost of the pilot boat was properly sustained, and there was no error in the exclusion of the evidence (*see Offer and Ruling Rec., p.* 42, *fol.* 80).

(*a.*) The measure of damage was the actual loss which the libellants sustained by the sinking of the vessel. The *Ann Caroline*, 2 Wall, 538, *per* CLIFFORD J., *p.* 550.

The rule is *restitutio in integrum*. *The Atlas*, 3 Otto, 302. And in all cases of wrongful injury to personal property, the measure of damage is the value of the property at the time of the injury.

Cortelyou v. *Lansing*, 2 Caines, cas. 200.
Smith v. *Griffith*, 3 Hill, 333.
Andrews v. *Durant*, 18 N. Y., 496.
Spier v. *Waters*, 65 Barb., 227.

(*b.*) The evidence offered was of the original cost of the pilot boat in 1863 and 1864, five years before her loss. This would not have afforded any test of her value in 1869, after she had been thoroughly repaired, nor would it have aided in the enquiry as to the value at the time of the collision. It would have been error to allow the evidence as offered.

Needles v. *Howard*, 1 E. D. Smith, 54; *see opinion of* INGRAHAM, *J.*, *p.* 63.

Sixth Point.—There is no error as to the amounts awarded by the several decrees of the District and Circuit Courts.

1*st.* The amount awarded by the decree of the District Court was properly limited as to the value of the property, to the amount of the stipulation for value, $16,000. There was no decree against the stipulators for either the $16,000 or the costs, but only against the schooner, with a

direction that the amount awarded, with the costs, be paid out of the proceeds of the stipulation for costs and value, when paid into the register of the court. Before any such payment was made, the appeal to the Circuit Court was taken. There was therefore no error in the decree of the District Court.

2*d*. The bond given by the claimants, on appeal to the Circuit Court, in the sum of $2,000 was for all damages and costs, which should be awarded *against the claimants*, as appellants, if they fail to make their appeal good. (*See bond on appeal, Rec., fol.* 102); and the total amount awarded by the Circuit Court was $17,407.47, a sum less than the amount of the original stipulation and the appeal bond.

Decree of Circuit Court, fol. 114.

3*d*. The bond given on the appeal to this court is for the sum of $36,000 (*Rec.*, fol. 134). and is conditioned to answer all damages and costs. The interest on the amount of the decree of the Circuit Court is the only addition to be made by way of increase to the damages below, and to this libellants are entitled. No question, therefore, arises as to the amount of the decrees below.

4*th*. Rule 29 of this court (General Rules) provides that supersedeas bonds in the Circuit Court must be taken that the appellant shall prosecute his appeal and answer all *damages and costs* if he fail to make his plea good, and that "such indemnity including 'just damages for delay,' and costs, must be for the whole amount of the decree, and *interest*, on the appeal." The plain distinction between the present case and those of the

Ann, Caroline and Webb, cited on appellants' brief, is that in those cases the actual assessment and award of value exceeded the amount of the stipulations for value. Here the amount was carefully restricted to the stipulated value, and the only question is whether interest as well as costs shall follow an affirmance of the decree in the Circuit Court, and in this court. There is no ground for depriving the libellants of interest.

Seventh Point.—The decree of the Circuit Court should be affirmed, with costs. The libellants, John Carroll and others, in whose favor separate awards for their personal effects were made, are entitled in form to a dismissal of the appeal as to them, as the sums awarded them were due in severalty, and the amounts were less than $2,000 in each case.

Merrill v. *Patty*, 16 Wall., 338.
The *Mary Eveline*, *Ib.*, 348.

WILLIAM ALLEN BUTLER,
Of Counsel for Appellees.

J. P. LEDWITH,
Proctor for Libellants, Appellees.

OPINION OF BLATCHFORD, J.

BLATCHFORD, J.: This is a libel filed against the schooner *Wanata* to recover for the damages caused to the libellants by the sinking and total loss of the pilot boat *Josiah Johnson*, and of certain clothing and other property on board of her, through a collision which occurred between the two vessels about nine o'clock P. M., on the 6th of March, 1869. The amount of damages claimed is $23,000. The libellant, Johnson, was the owner of the pilot boat, and the other libellants were the owners of such clothing and other property. The *Wanata* was on a voyage from New York to Charleston. The pilot boat was at anchor off the coast of New Jersey, in the Atlantic ocean, about half a mile from the shore, in four fathoms of water, about from fifteen to twenty miles north of Barnegat light. The wind was very strong from the northwest. The pilot boat was struck on her starboard side by the stem of the *Wanata*, and sank in a very few minutes. She had on board thirteen persons, all told, six of whom were pilots. Of these thirteen, eleven have been produced as witnesses for the libellants. The pilot boat had come to anchor because she had split her foresail. The libellants insist that the collision happened through the fault of those on board of the *Wanata*, in not keeping a proper lookout, and in sailing at too great a rate of speed. The claimants insist that the collision was caused by the negligence of those on board of the pilot boat, in anchoring in an improper

place, in not exhibiting a proper light, and in not keeping a proper watch on her deck.

The claimants fail to show that the pilot boat was anchored in an improper place.

As to the light on the pilot boat, I am satisfied on the evidence, that she exhibited such a light as is prescribed by Article 7 of the Statutory Regulations (Act of April 29th, 1864, 13 U. S. Stat. at Large, 58), for a vessel at anchor. It is insisted that she ought to have exhibited, not the white light, in a globular lantern, provided by Article 7, but a white light at the mast head and a flare-up light every fifteen minutes, as prescribed for sailing vessels by Article 8. It is insisted that Article 8, in speaking of "sailing vessels," means pilot vessels propelled by sails, in contradistinction to pilot vessels propelled by steam, and that as the pilot boat, in this case, was a vessel propelled by sails, she was bound to exhibit the lights prescribed by Article 8, at all times, both while at anchor and while actually sailing, and that the provisions of Article 7, as to the light to be exhibited by vessels at anchor, do not apply to her. It may be conceded that the expression "sailing pilot vessels" in Article 8, only includes pilot vessels propelled by sails, and yet it by no means follows that that article applies to such vessels while at anchor. In the first place, Article 7 prescribes a light for all vessels at anchor; Article 8 does not speak of vessels at anchor; and the wording of all the articles in the statute shows clearly that Article 8 was only intended to prescribe lights for sailing pilot vessels, while under way.

Whenever in the statute a light is prescribed as one to be borne and exhibited uninterruptedly in a fixed place, by a vessel under way, it is spoken of as a light to be carried. and the word "carry" is not applied to a light that is to be shown by a vessel at anchor, or to a light that is to be shown otherwise than uninterruptedly by a vessel under way. When a light is spoken of in the statute as one to be shown by a vessel

at anchor, or one to be shown otherwise than uninterruptedly by a vessel under way, the word used is "exhibit." In Article 3, for sea going steamships under way, in Article 4, for steamships when towing other ships, and in Article 5, for sailing ships under way or being towed, the word used is "carry." The vessels are supposed to be in motion, and are to "carry" the lights prescribed and such lights are to be visible uninterruptedly, and not to be exhibited at intervals only. But, when we come to Article 6, which provides for "exceptional lights for small sailing vessels" when under way, and the side lights cannot be fixed so as to be carried where they will be visible uninterruptedly, they are required to be "exhibited" on the approach of, or to other vessels. So in Article 7, the prescription in regard to vessels at anchor, is that they shall "exhibit" the prescribed light. In article 9, the provision is that open fishing boats and other boats, when under way, shall not be required to "carry" the colored side lights, but that, if they do not, the proper colored light shall be "exhibited" in the proper place, on the approach of, or to other vessels; and that such boats, when at anchor or stationary at their nets, shall "exhibit" a bright white light. In consonance with this use in Articles 3, 4, 5, 6, 7 and 9 of the words referred to, we find that in Article 8 the provision is, that sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

The word "carry" as there used, intends a light borne by the sailing pilot vessel while under way, and visible uninterruptedly; and the word "exhibit," intends a light on such vessel while under way, not visible uninterruptedly, but exhibited at prescribed intervals.

There would seem to be a good reason for prescribing for a sailing pilot vessel when under way, different lights from those prescribed for other sailing vessels

when under way, but no good reason can be conceived for prescribing for a sailing pilot vessel, when at anchor, different lights from those prescribed for other sailing vessels, when at anchor, especially in view of the fact that Article 7 prescribes one and the same light for all vessels at anchor, whether steamships or sailing ships. It is, undoubtedly, often convenient and even necessary, for a vessel which desires to take a pilot from a pilot boat, which is under way at sea, to approach so near to the pilot boat as to require the exercise of caution to prevent a collision between the two.

Such approach may be made at night, and for the pilot boat to carry and exhibit the lights prescribed by Article 8, so as to distinguish her from other sailing vessels would seem to be reasonable and useful, not only to indicate her character, but to guard against collision with her. But a pilot boat at anchor is presumptively not in the course of present service, not seeking employment for her pilots and not to be approached by a vessel seeking a pilot. Hence, there is no necessity that she should, when at anchor, show a different light from that shown by every other vessel at anchor.

As to the question whether in fact the pilot boat in this case exhibited, at and before the time of the collision, such a light as is prescribed by Article 7, the clear weight of evidence is that she did. In addition to all the other evidence the witness, Miller, who had been on deck on the pilot boat continuously for an hour and ten minutes before the collision, and had gone below for his coat a moment before the collision, testified that the light was burning brightly on the main peak halyard when he so went below, and that it had been so burning during the hour and ten minutes. Moreover the light was seen before the collision by those on board of the schooner, but at too late a moment to avoid the collision. It was in a proper place, fifteen or sixteen feet above the deck, and about fifteen feet abaft the mainmast the sails being all furled.

Placed as it was and with the pilot boat heading to the wind it ought to have been seen by the approaching schooner. All the discrepancy in the testimony as to the position in which some of the witnesses saw the light after the collision is owing to the fact that some of them looked at it from the higher position of the deck or bulwarks of the schooner, the pilot boat being lower in the water, and to the further fact that its position was lowered by the canting aft of the mainmast owing to the injury it received by the blow from the schooner. It is clear on the proofs that the schooner had no proper lookout, and that the collision was due to her negligence in that respect. A lookout stationed forward upon her engaged diligently in searching for lights and vessels ahead with his attention not distracted by other duties would undoubtedly have seen the pilot boat's light in season to have enabled the schooner by a change of helm to avoid her, anchored as she was. Especially was this duty of keeping a vigilant watch, of the character indicated, incumbent upon the schooner on such a night, and in her existing predicament. The wind was so violent that she was unable to keep her own side lights burning, and she was running in under shortened sail to anchor under Barnegat. Still her speed was considerable, and having no lights to indicate to those on other vessels her approach it was especially incumbent on her to watch closely for such other vessels. In view of the fact that the pilot boat was at anchor and exhibited a proper light and that the schooner had no lights to indicate her approach, it cannot be regarded as a fault on the part of the pilot boat, contributing to the collision that no one of her company was on deck or on watch at and just before the collision.

There having been no fault on the part of the pilot boat and the collision being caused by the fault of the schooner, there must be a decree for the libellants with costs with a reference to a commissioner to ascertain and report the damages sustained by the libellants.

2 Wall 550

23 Ball 1

2 Mason 409
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1 Stetson

Dunlap Bros

4 Bon - 310 Harrison

4 Blatch 92 cannot find Stiff

Peterson 240

2 Gall 224 - 234 - 149

Bon Allen 240
159

12 Howe 10

12 Mack 204

10 Blatch 313

5 Branch 488

10 Mack 294

Ware 210 - 235

Williams - Dana

Abbott Adm 65 - 222, 126

Olson 240